No. 06-514

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EDWARD LEROY SWINDELL,
and others of similar circumstances,

Petitioner,

—v.—

FLORIDA EAST COAST RAILWAY COMPANY
& CSX TRANSPORTATION COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

EDWARD LEROY SWINDELL
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Petitioner Pro Se

QUESTIONS PRESENTED FOR REVIEW

1. Can a Court attribute to Congress intent that Congress did not express either implicitly or explicitly and must the Court abide by the precept of Jurisprudence of Original Intention in the absence of any evident intent to the contrary on the part of Congress?

2. Whether a Court can impose provisions of a statute not plead upon the party bringing the action in the absence of any evidence that Congress intended that statute to apply.

3. Is Petitioner's right to trial by jury under the Seventh Amendment to The United States Constitution violated by the issuance of a summary judgment when there were substantial and material issues of fact presented, unresolved and in dispute and is the right to confrontation of witnesses embodied in the Sixth Amendment implied and present in the Seventh Amendment?

4. Whether the clear-cut violations by the Respondents of the Title 45 of the United States Code and the Code of Federal Regulations governing the railroads under the Boiler Inspection Act and the Safety Appliance Act requiring strict imposition of fines for improper care of equipment and provision of a safe place for employees to work prevent courts from imposing limitations under negligence acts to actions brought under strict liability acts.

5, Whether the issuance of a summary judgment against a party to the action acts as a bar to other parties from proceeding in the action under the Seventh Amendment?

6. Whether a defense attributable to one defendant automatically becomes available to another defendant who would otherwise not be able to avail himself of it?

PARTIES TO THE PROCEEDINGS

The petitioner in this Court is Edward LeRoy Swindell, a resident of the State of New York, who was an employee of the respondents and is bringing the present action on a pro se basis. There are additional former employees as listed in the Appendix hereto who may join in the action if the writ is successful and the action is remanded for trial. The respondents in this action are the Florida East Coast Railway Company and the CSX Transportation Company, the successor to the Atlantic Coast Line Railway, who employed the petitioner. The respondents and the various subsidiaries are listed as follows:

Florida East Coast Industries, Inc.

- Florida East Coast Railway Company
- Florida East Coast Highway Dispatch Company
- Florida East Coat Inspections, Inc.
- Florida East Coast Deliveries, Inc.
- Railroad Concrete Crosstie Corporation
- Railroad Track Construction Company
  - Operations Unlimited, Inc.
- Florida Express Carrier, Inc.
- Gran Central Corporation
- Dade County Land Holding Company, Inc.
- International Transit, Inc.

CSX Corporation

- CSX Transportation, Inc.
- CSX Intermodal
- CSX Technology
- CSX Real Property
- TRANSFLO
- Total Distribution Services, Inc.
- The Greenbrier

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STATEMENT OF BASIS FOR JURISDICTION

Jurisdiction for the petition for certiorari is based on the following:

1. Judgment US Court of Appeals, Eleventh Circuit entered and filed May 2, 2006.

2. Petition for Rehearing en banc (Rule 35, FRAP) denied July 12, 2006.

3. The basis for jurisdiction in the District and Circuit Courts was predicated upon diversity of citizenship and violation of the following acts and laws of the United States:

   a. Safety Appliance Act, 45 USC Sec. 1-16 et seq.

   b. Boiler Inspection Act, 45 USC Sec. 22-34 et seq.

   c. Seventh and Fourteenth Amendments to the U.S. Constitution,

   d. 49 CFR Ch 11, Sec. 229.5 (m).

   e. Title 45 of U.S Code

FEDERAL STATUTES, RULES CONSTITUTIONAL PROVISIONS

Safety Appliance Act, 45 USC Sec. 1-16 et seq.

Boiler Inspection Act, 45 USC Sec. 22.-34 et seq.

Seventh and Fourteenth Amendments, U.S. Constitution

49 CFR. Ch. 11, Sec. 229.5(m)

STATEMENT OF THE CASE, FACTS AND BASIS FOR FEDERAL JURISDICTION

Petitioner was employed by the defendant Florida East Coast Railway from, January, 1939 until 1952, first as a laborer, January 1939, to May, 1939, then as an apprentice, May, 1939, to 1943, and finally as an electrician and Diesel Locomotive Attendant on "line-of-road" on trains owned and operated by both the Florida East Coast Railway and the Atlantic Coast Lines (purchased by the CSX Transportation Co.) from 1943 until 1952.

The petitioner's duties required him to handle and be in close proximity to asbestos debris, dust and other toxic substances which permeated the repair shops and also were emitted by defective parts, such as ball cocks and cut-off steam valves, on the locomotives operated by the Respondents while in motion on-line-of-road. No protective gear or safety equipment was ever afforded to respondent.

In 1994, Petitioner was diagnosed as suffering from asbestosis as a result of taking a CAT scan. On March 16, 1996, he filed an action in Florida state court following an action commenced by one of his co-workers during his period working for FEC. After his co-worker's verdict was overturned, the judge in his case demanded that Petitioner withdraw his case, which he did "without prejudice" on June 11, 1998.

Since that time, Petitioner has been continually attempting to recover

for various injuries suffered at the hands of the Respondents. He has been stymied by what he believes to be erroneous interpretation and application of federal statutes, primarily the Federal Employers Liability Act.

A suit filed in U.S. District Court, Southern District, New York, on September 11, 1998, was dismissed without prejudice on March 26, 1999, decision upheld in the Court of Appeals, Second Circuit, on December 23, 1999, based on lack of venue.

Petitioner filed on February 25, 2000, an action in the U.S. District Court in Jacksonville, Florida for damages for injuries suffered from asbestosis and a second injury for emotional distress, diagnosed in April, 1997. On March 2001 the judge in the Florida District Court entered a summary judgment against the Petitioner ruling that his cause of action was time barred under the statute of limitations provisions contained in the Federal Employers Liability Act. This order was upheld by the Court of Appeals for the Eleventh Circuit on March 7, 2002.

On May 23, 2003, Respondent filed suit against the Respondents, FEC and CSX Transportation Company, in the U.S. District Court for the Middle District of Florida for the injury of Emphysema, diagnosed in 2002, resulting from being subjected to noxious fumes by d fective equipment while performing the duties of Diesel Locomotive Attendant on trains operated by the Respondents herein between New York City and Miami, Florida. The suit was brought under the Boiler Inspection Act and the Safety Appliance Act.

The judge in the District Court applied the statute of limitation statute contained in Federal Employers Liability Act, even though the action was not brought under that statute and entered summary judgment against the Petitioner and also applied res judicata as against FEC. Relying on an unworn affidavit submitted by the respondents, the Judge declared that emphysema and asbestosis were both part of a condition called Chronic Obstructive Pulmonary Disease (COPD) and therefor the injury diagnosed as emphysema was not a valid second injury. This decision was upheld by the Court of Appeals, Eleventh Circuit on May

2, 2006., and Petition for Review En Banc was rejected on July 12, 2006.

ARGUMENTS

1.

THE PRECEPT OF JURISPRUDENCE OF ORIGINAL INTENTION PRECLUDES THE COURT FROM ATTRIBUTING TO CONGRESS AN INTENT TO ATTRIBUTE LACHES PROVISIONS TO ACTS PREVIOUSLY ENACTED WHERE NO INTENT BY CONGRESS TO DO SO IS EVIDENT OR IMPLIED.

The doctrine, first enunciated in *Marbury v. Madison,* 5 US 137 (1803), holds that the original meaning of constitutional provisions and statutes are to be considered the only reliable guide for judgment. This is especially pertinent in the present case where the courts below have taken a provision -statute of limitations - from one statute and applied it to an action under two other statutes in which there is no time limitation expressed or implied.

The statutes in question have different aims and goals and, while distantly related, purposes and effects are dissimilar. The BIA and SAA were enacted to protect the public and employees from injury due to defective elements such a boilers, switches, etc. and defective operation of railroad equipment while engaged in interstate commerce, while FELA was enacted at a later time to protect employees from injuries resulting from the railroads' negligent operations or conditions.

Historically, as railroads expanded, there was a steady increase in major accidents to employees. As an example, even though a method of automatic coupling of cars and locomotives was developed, it still became necessary for workers to manually insert connecting pins, which often resulted in injuries due to rolling stock. As the injuries mounted, Congress took note and passed the Safety Appliance Act (SAA) making a railroad liable for any injury to an employee "on line of road" with *no proof of negligence required.* Since there is strict liability of negligence

per se under this act, no statute of limitation or laches protection is required, nor was it inserted.

Later on, there were a great many instances of locomotive boilers exploding while being refilled in stations, resulting in death and injuries to passengers and employees. The carnage became so great that Congress enacted the Boiler Inspection Act (BIA) which again employed the doctrine of *negligence per se* in holding the railroads responsible for damages. It is important to note that protection of the BIA was awarded not only to employees, but to anyone riding on the railroad and consequently injured. Thus, the argument by CSX that they bore no responsibility to Swindell because he was not their employee is moot.

Employees of railroads who were not assigned to trains and not engaged in interstate commerce were not covered by SAA or BIA and were forced to rely on state protection under common law and Workmen's Compensation Laws. This produced such a wide variety of results that Congress passed the Federal Employees Liability Act (FELA) covering all employees injured at work due to employer negligence. Congress in the Act *expressly* required proof of negligence for recovery for injury and inserted a statute of limitations..

While FELA supplemented coverage of SAA and BIA, there is *no evidence stated or implied that FELA superseded or encompassed* SAA and/or BIA. "The Boiler Inspection Act is not part of the Employers' Liability Act, and the former imposes absolute liability while under the latter, negligence must be shown." *Guegan v. New York Cent. R Co.*, C.A.N.Y. 1957, 243 F.2d 524, see *Lilly v. Grand Trunk Western R. Co.*, 317 US 481.

Contrary to Respondents assertions that individuals cannot recover under SAA and BIA, there are many cases involving private litigants under the SAA. and/or BIA. See: *St. Louis, I.M. & S.R. Co., v.Taylor,* 210 U.S. 281 (1908); *Pennell v. Philadelphia & R.R. Co.*, 231 U.S. 675 (1914); *Louisville & N.Rd. Co. v. Layton*, 243 U.S. 617 (1917); *Baltimore & Ohio `R. Co. v. Jackson*, 353 U.S. 325 (1957).

In *Urie v. Thompson*, 337 U.S. 163 (1949), the Court clearly held that Congressional intent must be clearly shown and there must be a "specific showing what Congress had in mind and we are not free to create one by inference",

Just recently, in ruling that a general federal statute, the Controlled Substances Act, did not give the Attorney General authority to override a specific Oregon Law, the Death With Dignity Act, this Court held that the federal law did not specifically grand such authority. "Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions - it does not, one might say, hide elephants in mouse holes," *Gonzales v. Oregon*, 00 U.S. 04-623 (2006); see: *United States v. Bass*, 404 U.S. 336 (1971); *BFP v. Resolution Trust Corporation*, 511 U.S. 531 (1994); Rush *Prudential HMO Inc. v. Moore*, 536 U.S. 531 (1994).

It is not the duty of the judiciary to legislate. The courts must assume that Congress means what it says and what it does not say. Congress has had many years to amend BIA and SAA to include the statute of limitations provisions of FELA, but has not done so. Rightly so, since negligence per se statutes do not fall under the guidelines of necessity for laches, since it is the act of injury itself, which makes the perpetrator liable, and negligence or contributory negligence are not issues.

2.

IT IS NOT WITHIN THE PREROGATIVE OF COURTS TO IMPOSE PROVISIONS OF A STATUTE NOT PLEAD UPON THE PARTY BRINGING THE ACTION.

The Petitioner has brought this action under BIA and SAA and not under FELA. The courts below were not justified in arbitrarily imposing FELA provisions in this action.

Although Respondent has attempted for some time to recover from Respondents for various injuries he has cruelly suffered at their hands, he realized in a prior suit that there would be little opportunity for him

to recover under the negligence provisions of FELA and consequently brought the present action for a separate injury under BIA and SAA. It is felt that the cause of this injury, Emphysema, was caused by defective equipment, namely emissions from defective ball cocks on the locomotives while under way. Thus, it was proper to bring the action under the statutes expressly covering the situation.

There is no expression of intent contained in FELA that it is preempting recovery under BIA or SAA or even that it should be taken in conjunction. As stated previously its audience was different and aims were different. It is not up to a judge to actively insert himself in favor of one party. The fact that courts in other cases have also imposed FELA in actions brought under SAA or BIA does not make it right.

3.

SUMMARY JUDGMENTS MAY NOT ISSUE WHEN THERE ARE SUBSTANTIAL ISSUES OF FACT UNRESOLVED. PETITIONER'S RIGHTS TO TRIAL BY JURY UNDER THE SEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, SIMILAR TO RIGHTS AFFORDED DEFENDANTS IN CRIMINAL CASES UNDER THE SIXTH AMENDMENT, HAVE BEEN VIOLATED.

"Where triable issues of material fact are presented, a plaintiff has a right to a jury trial", Stacy Corvette, et al. v. Department of Transportation, S089010, Ct.App 2/3B 125741, Los Angeles County, Superior Ct. No. BC081191, Supreme Court, California. July 12, 2001. Summary judgment is only properly awarded where there is no genuine issue of material fact., Hayward v. Medical Center of Beaver County, 608 A.2d 1040 (Pa. 1992); see Tullius v. Albright, slip p. 1364, 240 Fad 1317 (2001).

Petitioner has repeatedly pointed out that there are material facts in dispute - the nature of his injuries, their onset and his employment relationship with one of the respondents.

It is the contention of the Petitioner that right of confrontation afforded defendants in criminal cases under the Sixth Amendment, recently reaffirmed by this Court, is also embedded in the Seventh Amendment right to trial by jury. The right to a jury trial in a civil case implies that witnesses will be examined and confronted and evidence examined before a jury. In the present case, the District Court judge based his decision on the unsupported and unsworn submission of a doctor (Saleeby) who had not examined the Petitioner nor had Petitioner been permitted to examine his credentials.

As was stated in Urie v. Thompson, *supra*, there can be numerous "second" injuries arising from initial exposure to asbestos or abrasive or noxious fumes. Some injuries manifest themselves early and some manifest themselves at a later time.

This has been the case with the Petitioner. Originally diagnosed with asbestosis, he attempted to recover in an action in state court. Later actions failed due to courts insisting on applying FELA limitations, both for asbestosis recovery and emotional distress.. An expert hired by the Respondents maintained that he was not suffering from asbestosis. Finally, in 2002, well within any time limits for laches in the present action could be imposed, Swindell was diagnosed as suffering from Emphysema. by a reputable pulmonologist.

In determining the onset of an illness, the nature of the tort itself and the character of the injury will frequently prevent knowledge of what is wrong, so that the plaintiff is forced to rely upon what he is told by the physicians or surgeons. *Restatement (Second) of Torts*, Comment E, page 444, 8 89 (1979). One has to know the specific nature of the injury before one can be compensated for the injury.

Respondents have made a claim that there is no difference between Emphysema and a condition known as COPD, while at the same time avowing that Asbestosis is also COPD, yet stating that Asbestosis differs from Emphysema. This is a variation of the "that is an animal, it has four legs, it is a horse; therefor all animals with four legs are horses" logic. Their expert witness, Dr. Saleeby, whom the Petitioner was not

logic. Their expert witness, Dr. Saleeby, whom the Petitioner was not permitted to examine, states that asbestos and emphysema are different ailments. **See Appendix A61, A86**

COPD is a condition or grouping of a large number of diseases or ailments including Asthma, Allergic Alveolitis, lung cancer, farmers' lung, etc. having different .causes and different treatments. As pointed out in pages 16-19 of Petitioner's Appellant Brief, being labeled as having COPD is similar to being labeled as having "stomach pain". One has to know the specific nature of the pain, whether appendicitis or "gas", before making an accurate diagnosis or prescribing treatment.

One must know the nature of an injury before attempting to enforce a claim. See *Pritzlaff v. Archdiocess of Milwaukee*, 194 Wis.2d 302, 533 N.W. 2d 780 (1995); *Sopha v.. Owens-Corning Fiberglass Corp.*, 984 343 Sup.Ct. Wisc. (2000). The knowledge of the injury must be on the basis of objective facts. *Probate Estate of Raymond Krause et al. v. Shell Oil., et al.*, Case No. 96-CV-72144-DT, 1/30/98. Reasonable diligence under the Discovery Rule is only applicable under negligence cases. *Salinas v. Gary Pools, Inc.*, SW 3rd, 200 WL 1344509 (4th Court of Appeals-San Antonio, TX)(September 20, 2000) Since injuries under SAA or BIA do not require proof of negligence, Swindell was not obligated to bring an action until he actually knew what he was suffering from, i.e. when diagnosed with Emphysema in 2002. That is what he did.

In any event, the nature of the injury suffered and its onset are *material facts in dispute* and should have been determined by a jury. *Michael v. Norfolk Southern Railway Company*, U.S.C.A., 11th Cir. No. 94-9373-.94-9375 (Feb. 6 1996); *Augusta Iron and Steel Works., Inc. v. Employer's Insurance of Wausau*, 835 F.2d 855, 856 (11th Cir. 1988). The nature of the disease and "when the disease manifested itself was a question of fact not subject to resolution by summary judgment". *Celotex Corp. v. Copeland*, 471 So,2d 533, 539 (Fla. 1985); *Copeland v. Armstrong Cork Co.*, 447 So.2d 926 (Fla.3d 1984).. Petitioner has diligently attempted to find the true cause of his injuries. He found a true cause of his injury in 2002 when being diagnosed by a

was when the accumulated effects amounting to sufficiency to recover were established. *Associated Indemnity Corp. v. Industrial Accident Commission*, 124 Cal.App.378, 12 P.2d 1075.

For whatever reason, the courts below have seen fit to willfully deprive the Petitioner of his rights under the Seventh Amendment of the United States Constitution by depriving him of his right to trial by jury. The courts below have ruled on issues of fact not sworn to and not supported by sworn affidavit and the Petitioner has not been able to face his accusers, examine them or evidence submitted. It should be borne in mind that the Seventh Amendment is to civil cases what the Sixth Amendment is to criminal cases and Petitioner's rights have been trampled on. The courts below have overstepped their bounds.

4.

VIOLATIONS OF TITLE 45 OF THE UNITED STATES CODE AND THE CODE OF FEDERAL REGULATIONS AS EMBODIED IN THE BOILER INSPECTION ACT AND THE SAFETY APPLIANCE ACT REQUIRE STRICT IMPOSITION OF FINES AND PENALTIES FOR IMPROPER CARE OF EQUIPMENT AND PROVISION OF A SAFE PLACE TO TRAVEL OR WORK. THEREFOR, COURTS MAY NOT IMPOSE LIMITATIONS UNDER NEGLIGENCE ACTS TO ACTIONS BROUGHT UNDER STRICT LIABILITY ACTS.

Violations under the specified Acts are to lead to strict imposition of fines. There is no provision or room for mitigation, negligence is not a factor, so there is no place for time limitations. This is one more reason why the courts have erred in applying FELA provisions to actions under BIA and SAA.

5.

BY ISSUANCE OF SUMMARY JUDGMENT AGAINST PETITIONER IN THIS CASE THE JUDGE IGNORED THE FACT THAT ACTION WAS BROUGHT BY PETIITIONER "AND OTHERS OF SIMILAR CIRCUMSTANCES" THUS PREVENTING OTHERS LISTED IN APPENDIX FROM JOINING THE ACTION.

When under notice that there might be others joining in the suit at a later date, the District Court, by issuing the summary judgment against Petitioner denied those persons their rights to a hearing and trial.

6.

A PARTY CANNOT AVAIL ITSELF OF A DEFENSE THAT WAS UTILIZED BY A CO-DEEFENDANT THAT WOULD OTHERWISE NOT BE AVAILABLE TO IT.

One of the Respondents, CSX, was not a party to any prior actions by Petitioner herein, yet has successfully been able to wrap itself in the laches defense used by the other Respondent, FEC. Not being part of the prior actions, any defense of res judicata or time limitations were not available to CSX. The District .Court should have continued the action as against CSX while dismissing it against FEC if its decision was valid, which it was not..

SUMMARY

In summary, Petitioner prays for consideration of this petition for writ of certiorari for reasons of justice and because:

1. The Courts below failed to abide by the precept of Jurisprudence of Original Intention and ascribed intent to Congress that was patently in contradiction of Congress's desires both express and implied.

2. The Courts below improperly imposed provisions of a statute not plead upon the Petitioner.

3. There was clear violation of the Seventh Amendment of the U.S. Constitution in the denial of right to jury trial while substantial issues of fact were unresolved and witness statements were relied upon without ability of the Petitioner to examine and exercise his rights under the Seventh Amendment and the Sixth Amendment.

4. Violations of the Safety Appliance Act and Boiler Inspection Act require strict imposition of fines for injuries and improper and unsafe working conditions and thus preclude limitation provisions under negligence acts.

5. Imposition of Summary Judgment deprived others of like circumstances from being able to proceed under this action.

6. When there are co-defendants in an action, a defense solely available to one should not be allowed to be used by other defendant who would not otherwise be able to employ it.

Respectfully submitted,

EDWARD LEROY SWINDELL P.O. BOX 36
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Petitioner Pro Se

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Jacksonville Division A94

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District of Florida, Jacksonville Division A107

Defendant CSX Motion to Dismiss A121

Complaint filed May 23, 2003, United States
District Court, Middle District of Florida,
Jacksonville Division A125

CO-EMPLOYEES OF PETITIONER
SWINDELL POTENTIAL PETITIONERS

Herman Mitchell
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New Smyrna, Florida

(OD) C.H. Cody
391 Fortune Street
St. Augustine, Florida

(SD) R.V. Osborne
1320 Wildwood Drive
St. Augustine, Florida

(OD) Beydette Fox
215 Estrada Avenue
St. Augustine, Florida

(WO) Billy Moore
Si 19th Street
St. Augustine, Florida

(AF) Wilbur Meeks
439 Palms Street
New Smyrna, Florida

(AF) Rufus Walker vs FEC
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John Osborne vs FEC
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Elkton, Florin 32033
904-824-1656
Vol 1
Vol 2
Fla. 92-04179

(SD)	Edward LeRoy Swindell -vs FEC	Fla. 96-011352
(AF)	Leroy Thrift vs FEC	Fla. 92-04180

(SD) David Edgell.
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(AF) Rosevelt Robert James
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Jimmy Herndon
(pipe fitter)
340 Floyd Drive
Smithville, Tennessee 37166
615-5974105

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EDWARD LEROY SWINDELL
and others of similar circumstances,

Appellant,

vs.

Case No.; 054 573 1-D

FLORIDA EAST COAST RAILWAY, LLC.
and CSX TRANSPORTATION, INC.

District Court No.: 3-03-CV-4354-25 TEM

Appellees.

_____/

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

1. Hon. Thomas E. Morris, United States Magistrate Judge

2. Eric L. Leach, Attorney for Appellees

3. Sean L. Mulhall, Attorney for Appellees

4. Florida East Coast Railway, L.L.C. (Successor-in-interest to Florida East Coast Railway Co.)

5. Florida East Coast Industries, Inc. (Parent corporation of Florida East Coast Railway, L.L.C.)

6. CSX Transportation, Inc., Appellee

7. CSX Corporation, Inc. (Parent corporation of CSX Transportation, Inc.)

8. Edward Leroy Swindell, Pro-Se Appellant.

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

For rules and forms visit
www.ca11.uscourts.gov

July 20, 2006

Sheryl L. Loesch
Clerk, U.S. District Court
300 N HOGAN ST STE 9-150
JACKSONVILLE FL 32202-4271

Appeal Number: 05-15731-DD
Case Style: Edward LeRoy Swindell v. Florida East Coast
District Court Number: 03-00435 CV-J-TEM

The enclosed certified copy of the judgment and a copy of this court's opinion are hereby issued as the mandate of this court.

Also enclosed are the following:
Original Exhibits, consisting of: one folder
Original record on appeal or review, consisting of: two volumes

The clerk of the court or agency shown above is requested to acknowledge receipt on the copy of this letter enclosed to the clerk.

A copy of this letter, and the judgment form if noted above, but not a copy of the court's decision, is also being mailed to counsel and pro se parties. A copy of the court's decision was previously mailed to counsel and pro se parties on the date it was issued.

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: James O. Delaney (404) 335-6113

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-15731-DD

EDWARD LEROY SWINDELL,
and others of similar circumstances,

Plaintiff-Appellant

--versus--

FLORIDA EAST COAST RAILWAY COMPANY,
CSX TRANSPORTATION CORPORATION,

Defendants-Appellees.

On Appeal from the United States District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Opinion_____, 11th Cir., 19_____, _____F.2d _____).

Before: DUBINA, HULL and MARCUS, Circuit Judges.
PER CURIAM:

The petition (s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en bans (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

THOMAS K. KAHN
UNITED STATES CIRCUIT JUDGE

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

For rules and forms visit
www.ca11.uscourts.gov

July 12, 2006

Edward LeRoy Swindell
Tower Hill Road
PO BOX 36
MILLBROOK NY 12545-0036

Appeal Number: 05-15731-DD
Case Style: Edward LeRoy Swindell v. Florida East Coast
District Court Number: 03-00435 CV-J-TEM

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Regina Veals-Gillis (404) 335-6163

Edward LeRoy Swindell
Tower Hill Road
PO BOX 36
MILLBROOK NY 12545-0036

July 12, 2006

Appeal Number: 05-15731-DD
Case Style: Edward LeRoy Swindell v. Florida East Coast
District Court Number: 03 -0043 5 CV-J-TEM

TO: Edward LeRoy Swindell

CC: Eric L. Leach

CC: Administrative File

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO: OS-15731-DD

District Court No. 03-00435 CV-J-TEM

Edward LeRoy Swindell
Appellant Pro Se
and
others of similar circumstances

-vs-

Florida East Coast Railway Company &
CSX Transportation Company

Appellees

PETITION FOR REHEARING EN BANC

On Appeal from Summary Judgment from the United States District Court for the Middle District of Florida, Jacksonville Division

---

Edward LeRoy Swindell
P.O. Box 36 Tower Hill Road
Millbrook, NY 12545-0036
Telephone: 845-677-5991

Appellant/Plaintiff Pro Se

CERTIFICATE OF INTERESTED PARTIES

Edward LeRoy Swindell, Plaintiff-Appellant

Florida East Coast Railway Company, Defendant-Appellee

CSX Transportation Corporation, Defendant-Appellee

Eric L. Leach, attorney for Defendant-Appellee

Sean Lawrence Mulhall, attorney for Appellant-Appellee

The Honorable Thomas E. Morris, District Judge

The Honorable Dubina, Hull and Marcus, Circuit Judges

Plaintiff Appellee affirms and certifies that to the best of his knowledge the above list is a true list of interested parties in the present Petition for Rehearing.

Edward LeRoy Swindell, Pro Se
Edward LeRoy, Plaintiff - Appellant

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STATEMENT OF ISSUES PRESENTED

1. It is the contention of the Plaintiff-Appellant that his rights under the Sixth Amendment of the United States Constitution have been violated and abrogated by the decisions in the present case.

2. Plaintiff/Appellant has filed this action pro se on behalf of himself and others of similar circumstances. He has been prevented from bringing forth those others whose rights have consequently been obviated..

3. There is no question of statute of limitations or res judicata vis-a-vis Defendant-Appellee CSX as it was not a party to prior actions and those defenses are not available to it.

STATEMENT OF COURSE OF PROCEEDINGS AND DISPOSITION OF THIS CASE

On May 23, 2003, Plaintiff-Appellant filed suit against the Defendant-Appellees, FEC and CSX Transportation Company, in the U.S. District Court for the Middle District of Florida for injuries, specifically emphysema, suffered by him while working on "line of road" on Defendants' locomotives. The claims were filed under the Code of Federal Register (CFR), the Safety Appliance Act (SAA), the Boiler Inspection Act (BIA), and the Interstate Commerce Commission (ICC) rules and regulations.

The district court entered summary judgment in favor of both defendants, applying a three-year statute of limitations contained in FELA even though the action was not brought under that statute and, as regards FEC, applying res judicata..

Plaintiff-Appellant appealed and the judgment of the district court was affirmed on May 2, 2006.

STATEMENT OF PERTINENT FACT

The Judge in the District Court permitted the entry and relied in his decision on an unsworn affidavit by a medical practitioner without permitting the Plaintiff/Appellant to question qualifications, confront the witness or contradict his testimony in violation of the Sixth Amendment of the Constitution of the United States.

ARGUMENT AND AUTHORITIES

1. It is a well-established precept of law, embedded in the Sixth Amendment of The United States Constitution and through centuries of common law, that an accused must be allowed to face his accuser. A party has a constitutional right to be confronted by the witnesses against him. The People v. Andrew Goldstein, No. 155, December 20, 2005, New York State Court of Appeals; Crawford v. Washington, 541 U.S. 36 (2004); Coy v. Iowa, 487 U.S. 1012 (1988). The only permissible exception is if the failure to permit confrontation was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18,24 (1967); People v. Crimmins, 36 NY2d 230, 240-241 (1975). That is not the case here.

The decisions in the District Court and Court of Appeals in the present case rest on and are based on the unsubstantiated, unfounded and unworn document attributed to a Doctor Saleeby and presented by the defendants to the district court as evidence. The document purports to aver that COPD and emphysema are the same. Relying on this, the courts have ruled that the Plaintiff/Appellant knew or should have known of his illness or injury at an earlier time than he was diagnosed with emphysema and thus is precluded from pursuing his just cause because of a presumed application of a statute of limitations.

It is the contention of the Plaintiff/Appellant, and a contention that he is prepared to prove before a jury, that COPD is a condition and emphysema is a disease or injury externally caused. As stated in his brief, having a diagnosis of COPD can be likened to a person going to a doctor complaining of a stomach ache. That is the condition. Upon further diagnosis or testing, the doctor may find that the patient is suffering from appendicitis or perhaps merely gas. Those latter are the illnesses. In the same way, COPD is a condition and a patient could be suffering from asbestosis, emphysema or other pulmonary disease. Plaintiff/Appellant steadily attempted to discover the cause of his condition. He initially believed that his illness was asbestosis until a specialist provided by one of the Defendant/Appellees (FEC)

averred otherwise. At that point he had no knowledge that he was suffering from emphysema and it was not until 2002 when he sought help from a pulmonologist that he discovered the nature of his injury or illness. How could he recover for a condition not knowing what he was suffering from? History of the case shows clearly that he has not slept on his rights, but has endeavored to secure them. See Urie v. Thompson, 337 U.S. 163 (1949).

In any event, the Plaintiff/Appellant has been denied the opportunity to face and respond to the witness relied upon by the Defendant/ Appellees and by Justices exercising and approving summary judgment. When the Plaintiff/Appellant knew or should have known he was suffering from emphysema is of utmost importance and the improperly admitted document from Dr. Saleeby is prejudicial. It is the responsibility of the party presenting the evidence to prove beyond a reasonable doubt that introduction of Dr. Saleeby's statements was harmless error. See People v. Goldstein, Chapman v. California, People v. Crimmins, supra,. Plaintiff/Appellant is fully prepared to prove that emphysema is a discrete disease that was diagnosed in 2002 and that, in spite of diligent pursuit, he did not know, nor could he have known, that it was the cause of his suffering. There is a question of fact that must be presented to a jury to determine and not a subject for summary judgment. Tulius v. Albright, slip p. 1364, 240 Fad 1317 (2001); Bailey v. Baltimore & O.R. Co., 323 U.S. 600 (1945).

2. Plaintiff/Appellee has filed pro se on behalf of himself and others of similar circumstances, whom he has not been permitted to bring forth in the current action. This is a clear violation of rights.

3. It must also be noted that the Defendant/Appellant CSX was not a party in prior causes of action and any defense relative to statute of limitation or res judicata is not available to it. See: Oliva v. Owens-Illinois, Inc., New Jersey Supreme Court, No. A-23-05, April 24, 2006. Please also note that a Florida statute was passed and signed into law on April 26, 2006, making defendants in civil cases liable for full damages even if they are only marginally responsible for an injury..

CONCLUSION

Since Plaintiff/Appellant's rights under the Sixth Amendment of the U.S. Constitution have been egregiously violated and the error involved was not minor or meaningless, the judgments in this case must be overturned and reversed and the case remanded to the district court for trial on the merits.

Since there are questions of fact more properly for a jury to resolve, the decisions must be reversed and the case remanded for consideration by a jury.

Since Plaintiff/Appellant filed pro se on behalf of himself and others of similar circumstances and has not been permitted to introduce same, the decisions must be reversed and remanded to the district court for trial before a jury

Defendant/Appellee CSX is liable for actions causing Plaintiff/ Appellant to suffer from emphysema separate from Defendant/Appellee FEC and judgment should be levied against it or the mater remanded for jury trial or such other remedial action that this court might see fit.

Respectfully Submitted,

Edward LeRoy Swindell,Pro Se
Edward LeRoy Swindell
Plaintiff/Appellant Pro Se
P.O. Box 36, Tower Hill Road
Millbrook NY 12545

CERTIFICATE OF SERVICE

A copy of this petition has been delivered by U.S. Mail to attorneys for the defendants: Sean Mulhall and Eric Leach, % Milton, Leach, Whitman, D'Andrea, Charek & Milton, P.A., 815 South Main Street, Suite 200, Jacksonville, Florida 32207-8257 on this day of May, 2006

Edward LeRoy Swindell,Pro Se
Edward LeRoy Swindell

United States Court of Appeals
For the Eleventh Circuit

No. 05-15731

District Court Docket No.
03-00435-CV-J-TEM

EDWARD LEROY SWINDELL,
and others of similar circumstances,

Plaintiff - Appellant,

-versus-

FLORIDA EAST COAST RAILWAY COMPANY, CSX TRANSPORTATION CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: May 2, 2006
For the Court: Thomas K. Kahn, Clerk
By: Harper, Toni

E. LeRoy Swindell
Tower Hill Road
P.O. Box 36
Millbrook NY 12545-0036

845-677-5991

May 23, 2006

Clerk of Court
United States Court of Appeals Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: Appeal Number: 05-15731-DD
Edward LeRoy Swindell v. Florida East Coast
District Court Number: 03-00435 CV-J-TEM 4

Please note that the United States Supreme Court on May 22, 2006, declined to review the decision of the New York Court of Appeals, People v. Goldstein, cited in Plaintiff/Appellants Petition, thus affirming Crawford v. Washington, also cited in the Petition and reaffirming that the Sixth Amendment requires the opportunity to confront adversarial witnesses.

This is crucial to the Plaintiff/Appellant's case.

Sincerely yours,

Edward LeRoy Swindell
Plaintiff/Appellant Pro Se

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. OS-15731
Non-Argument Calendar

D. C. Docket No. 03-00435-CV-J-TEM

EDWARD LEROY SWINDELL,
and others of similar circumstances,

Plaintiff-Appellant,

- versus-

FLORIDA EAST COAST RAILWAY COMPANY, CSX TRANSPORTATION CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(May 2, 2006)

Before DUBINA, HULL and MARCUS, Circuit Judges.
PER CURIAM:

This is the second appearance of Edward LeRoy Swindell, proceeding pro se, in this Court. On January 2, 2002, we affirmed the district court's entry of summary judgment in favor of Florida East Coast Railway Company ("FEC"), on Swindell's claims for physical and emotional damages under Florida law, the Safety Appliance Act

("SAA"), 45 U.S.C. §§ 1-16; the Boiler Inspection Act ("BIA"), 45 U.S.C. §§ 22-34; and the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51 et seq. See Swindell v. Fla. E. Coast Ry., No. 01-12263 (11th Cir. Jan. 2, 2002) (unpublished) ("Swindell I"). We held the district court correctly determined that Swindell's federal claims were barred by FELA's three-year statute of limitations, and that Swindell's Florida claim was barred by the Rooker-Feldman doctrine. Id., slip op. at 7-9. We rejected his suggestion that because he did not discover his injuries until April 1997, the limitations period applicable to his federal claims was tolled. Id., slip op. at 7-8.

On May 23, 2003, Swindell filed the instant action against FEC and CSX Transportation Company ("CSX") (collectively, "Defendants"), seeking to recover for alleged "second injuries" that he discovered in 2002. He asserted claims under the Code of Federal Register ("CFR"), the SAA, the BIA, and Interstate Commerce Commission ("ICC") rules and regulations. The district court entered summary judgment (1) in favor of both defendants based on the FELA's three-year statute of limitations and (2) in favor of FEC based on the doctrine of res judicata. In a thorough and well-reasoned 16-page opinion, the district court rejected each of the arguments Swindell asserts in this appeal, "Swindell II."

As we did in Swindell I, we have conducted a de novo review of the record. See Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1279 (11th Cir. 2004) (reviewing the grant of a motion for summary judgment de novo, "applying the same legal standards that bound the district court"). As for his claim against FEC, our review reveals that Swindell either knew or should have known about his chronic obstructive pulmonary disease ("COPD") or emphysema prior to his 2000 lawsuit, which was the subject of our Swindell I opinion. The medical records of Swindell's treating physicians indicate that as early as .1996, .and certainly no later than 1998, he was diagnosed with COPD.

We are unpersuaded by Swindell's argument that his COPD claim did not begin to accrue until he was "officially diagnosed" with COPD

in 2002. It is well-settled that, under the discovery rule, an injury accrues when a plaintiff knew or should have known about the injury, and based on his medical records, Swindell should have known that he suffering from the "second injuries" he alleges here, COPD or emphysema, no later than 1998. See Hill v. Georgia Power Co., 786 F.2d 1071, 1074-75 (11th Cir. 1986) (holding that a cause of action accrues and the statute of limitations begins to run, when in the exercise of reasonable diligence, the claimant knew or should have known of the injury). Moreover, Swindell's claim that he was unaware that he was suffering from emphysema based on a pre-2002 diagnosis of COPD is unpersuasive because (1) Swindell admits in his complaint that emphysema is an obstructive pulmonary disease, and (2) the defendants presented evidence that emphysema is a COPD.

"Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Allen v. McCurry, 449 U.S. 90, 94 (1980). "[R]es judicata can be applied only if all of four factors are shown: (1) the prior decision must have been rendered by a court of competent jurisdiction; (2) there must have been a final judgment on the merits; (3) both cases must involve the same parties or their privies; and (4) both cases must involve the same causes of action." E.E.O.C. v. Pemco Aeroplex, Inc., 383 F.3d 1280, 1285 (11th Cir. 2004), cert. denied, 126 S.Ct. 42 (2005) (quotations omitted, emphasis in the original). We have noted that "this bar pertains not only to claims that were raised in the prior action, but also to claims that could have been raised previously." Davila v. Delta Air Lines, Inc., 326 F.3d 1183, 1187 (11th Cir. 2003) (citation omitted) (emphasis added). Moreover, we have stated that, in order to determine whether prior and present causes of action are the same, "a court must compare the substance of the actions, not their form. . . . [I)f a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, that the two cases are really the same `claim' or `cause of action' for purposes of res judicata." In re, Piper Aircraft Corp., 244 F.3d 1289, 1297 (11th Cir. 2001).

Swindell's claim based on COPD or emphysema is not a "second injury" that would trigger a new statute of limitation, but instead is a claim that was previously litigated in his 2000 lawsuit against FEC and, therefore, as to FEC, is barred by the doctrine of res judicata. Our four-prong test is satisfied because (1) the prior decision was rendered by a court of competent jurisdiction - the United States District Court for the Middle District of Florida; (2) the district court's ruling that Swindell's claim was barred by the statute of limitations was a final judgment on the merits; (3) both cases involved the same parties (Swindell and FEC); and' (4) the prior and present causes of action are the same, involving work-related exposure to industrial pollutants resulting in COPD.

In any event, even if res judicata did not preclude the claim against FEC, Swindell's claims as to both defendants are barred by FELA's three-year limitations period, which we explained at length in Swindell I. See slip op. at 7-8. Put simply, Swindell knew, or should have known, that he suffered emotional injuries (including the injuries he terms "second injuries") for more than three

years prior to the date he filed this suit (and prior to the date of the underlying 2000 action we affirmed in Swindell I). Based on our review of the record and the parties' briefs, we discern no reversible error and we affirm the district court's grant of summary judgment in favor of the Defendants.

AFFIRMED.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO: OS-15731-DD

District Court No. 03-00435 CV-J-TEM

Edward LeRoy Swindell

Appellant Pro Se

-vs-

Florida East Coast Railway Company &
CSX Transportation Company

Appellees

REPLY TO APPELLEE'S ANSWER TO APPELLANT'S BRIEF

On Appeal from Summary Judgment from the United States District Court for the Middle District of Florida, Jacksonville Division

---

Edward LeRoy Swindell
50 Clubhouse Road
Key Largo, FL 33037
Telephone: 305-367-2011

Appellant/Plaintiff Pro Se

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STATEMENT OF THE CASE

Appellant (Swindell) desires to clarify certain statements made by the Appellees in their Answer and to put this cause of action in its proper perspective.

It should be pointed out at the outset that Swindell has been severely harmed by the Appellees. This has never been denied by them. Their actions in the past and those of others like them were considered so heinous that Congress saw fit to enact not one, but three separate pieces of legislation and statutes in an attempt to deter them from actions resulting in death, maiming, crippling and other severe injuries to their employees and members of the public. The desired deterrence has been of no avail. There are still serious injuries and deaths occurring to civilians and railroad employees in the shops and on line of road. Cases are continually brought in courts across the country for redress from wanton ways of the Appellees and their ilk. Were an individual to act in a similar manner, he would be incarcerated for his lifetime.

This case involves denial of due process and the right of the Appellant and those of similar circumstances to obtain redress. Swindell has not had his day in court to be heard on the merits, but has been stymied by the Appellees' resort to procedural maneuvers, factual distortion and even financial intimidation.

This case is about retribution for grievous harm done to the Appellant and those of similar circumstances by the Appellees herein. Quality of life has been severely constrained and indeed many of Swindell's co-workers who were desirous of joining his quest have succumbed to early deaths after having suffered similar ailments from the unclean hands of the Appellees.

The will of Congress has been thwarted and civil and constitutional rights have been denied. While the Appellant stands by all the arguments and facts put forth in his Complaint and the Appeal hereto, this cause of action basically is founded upon two major precepts:

1. JURISPRUDENCE OF ORIGINAL INTENTION

2. SUMMARY JUDGMENTS MAY NOT ISSUE WHEN THERE IS A QUESTION OF MATERIAL FACT IN DISPUTE

ARGUMENT IN REPLY

1. The Court below has failed to honor the precept of Jurisprudence of Original Intention.

While the Supreme Court and others may have often veered from this precept, the doctrine will undoubtedly be more steadily enforced in the future and holds that the original meaning of constitutional provisions and statutes are to be considered the only reliable guide for judgment. This is especially pertinent in this present cause of action, which is based on violations of Congressional acts.

As the railroads expanded, there was a steady increase in major accidents to employees. As an example, even though a method of automatic coupling of cars and locomotives was developed, it still became necessary for workers to manually insert connecting pins in the couplings. This was extremely dangerous since at least one of the cars was in motion There were so many injuries that Congress took notice and passed the Safety Appliance Act making a railroad liable for any injury to an employee "on line of road" *with no proof of negligence required*. Since there is strict liability of negligence per se under this act, no statute of limitation protection is needed or desired.

Later, there were many instances of locomotive boilers exploding while being refilled in stations with consequent death and injuries to employees, passengers and others in the vicinity. The explosions were usually the result of attempting to fill hot boilers with cold water or failing to provide needed maintenance. The carnage became so great that Congress passed the Boiler Inspection Act, which again employed the doctrine of negligence per se in holding railroads liable for damage from their actions. Since Congress wished to impose such a burden, there was no provision inserted relative to statute of limitation protection. It is of pertinence to these proceedings that the protection of the BIA was not only awarded to the railroad employees, but also to anyone riding on the railroad and consequently injured. Thus, even if it could not be proven that Swindell was acting as an employee of CSXT,

he still would be covered by the provisions of the BIA for injury sustained while on their trains and must be compensated for his injuries by it.

Employees of railroads who were not assigned to trains, but worked in the repair shops were not covered under the SAA or BIA, and were forced to rely on state protection and Workman's Compensation Laws. Recognizing this, Congress passed the FELA protecting all federal employees injured in line of duty. However, in this Act Congress *expressly* required proof of negligence and consequently inserted a provision for a statute of limitations.

While FELA supplemented coverage of SAA and BIA, there is no evidence stated or implied that FELA superseded or encompassed the SAA and BIA. "The Boiler Inspection Act is not part of the Employers' Liability ACT, and the former imposes absolute liability while under the latter, negligence must be shown." Guegan v. New York Cent. R. Co., C.A.N.Y.1957, 243 F.2d 524. see Lilly v. Grand Trunk Western R. Co., 317 U.S. 481. Contrary to the Appellees' assertions, there is no evidence that Congress intended FELA to be all encompassing. In addition, contrary to Appellees' statements, there are many cases involving private litigants under the SAA and/or BIA. See: St. Louis T.M. & S.R. Co. v. Taylor, 210 U.S. 281 (1908); Pennell v. Philadelphia & R.R. Co., 231 U.S. 675 (1914); Louisville & N.R.d Co. v. Layton, 243 U.S. 617 (1917); Baltimore &Ohio. R. Co. v. Jackson, 353 U.S. 325 (1957).

In Urie v. Thompson, 337 U.S. 163 (1949), the Court clearly held that Congressional intent must be clearly shown and there must be a "specific showing that Congress had in mind.... and we are not free to create one by inference". Urie v. Thompson, *supra*. Just recently, in ruling that a general federal statute, the Controlled Substances Act, did not give the Attorney General authority to override a specific Oregon law, the Death With Dignity Act, the Supreme Court declared that the federal law did not specifically grant such authority. "Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions - it does not, one might say, hide elephants in mouse holes"

It is not the duty of the judiciary to legislate. The courts must assume that Congress means what it says and what it does not say. The entire discussion of statute of limitation application to this particular case and this particular cause of action is not pertinent and the judgment of the lower court must be overturned.

2. Summary Judgments may not issue when there is a question of material fact in dispute.

"Where triable issues of material fact are presented, a plaintiff has a right to a jury trial". Stacy Corvette, et al. vs. Department of Transportation, S089010, Ct.App 2/3B 125741, Los Angeles County, Superior Ct. No. BC 081191, Supreme Court, California, July 12, 2001. Summary judgment is only properly awarded where there is no genuine issue of material fact. Hayward v. Medical Center of Beaver County, 608 A.2d 1040 (Pa. 1992). *See* Tulius v. Albright, slip p. 1364, 240 Fad 1317 (2001).

As Swindell has pointed out in his Initial Brief and repeatedly in various papers submitted, there are material facts that appear to be in dispute, both as to the nature of his injuries, their onset and also his employment with one of the defendants.

Swindell is contesting that he is suffering from Emphysema resulting from continual exposure to detritus fumes and substances emanating from defective blow-cocks on locomotives and other equipment owned and operated by the defendants during the course of his employment. He learned the cause of his illnesses when he was diagnosed by a pulmonologist in 2002. Prior to that time, he first believed that his suffering was caused by asbestosis, however, a pulmonologist selected by the defendant railroad, FEC, averred that he was not suffering from asbestosis or other pulmonary disease. As a result, Swindell consulted with various cardiologists in an effort to find relief. These cardiologists, while finding instances of emotional distress, were unable to diagnose a specific illness. It was not until Swindell consulted with a pulmonologist in 2002, that he finally was diagnosed with emphysema and learned the nature of his injury.

The nature of the tort itself and the character of the injury will frequently prevent knowledge of what is wrong, so that the plaintiff is forced to rely upon what he is told by the physicians or surgeons. Restatement (Second) of Torts, Comment E, page 444, 889,(1979).

The Appellees have made a claim that there is no difference between Emphysema and COPD, while at the same time avowing that Asbestosis is also COPD, yet stating that Asbestosis differs from Emphysema. This is a variation of the "that is an animal, it has four legs, it is a horse; therefor all animals with four legs are horses", logic. Their expert witness, Dr. Saleeby, states that asbestos and emphysema are different ailments. Please refer to page 16 of Appellant's Initial Brief for a partial listing of diseases or ailments that are grouped under COPD. One would hardly expect to undergo the same course of treatment for each one or expect the same manifestations of disease for each. There is no credible evidence that Swindell suffered from Emphysema prior to 2002. When he did is a material fact that must be presented to a jury.

There can hardly be a more material fact than the nature of the injury or illness suffered and the court below has erred in not allowing testimony regarding the relationship between the various diseases or ailments to be argued before and decided by a jury.

As Swindell has pointed out, COPD might be considered as a catch phrase relating to a number of illnesses pulmonary in nature, but requiring different 9. forms or treatment, much as "stomach ache" can cover gall bladder infections, appendicitis infections, etc., or Cancer can encompass lung, stomach, breast, cervical, and so forth. Appellees' own expert, Dr. Saleeby, testified in an affidavit that asbestosis and emphysema are different diseases. He also stated that "there are no pulmonary function results, smoking history, or chest film reports in the records I reviewed to tell me that he has COPD" Initial Brief of Appellant, Appendix, Exhibit B.

Clearly, from the record, Swindell did actively pursue the source of his injury and this finally led him to consult a pulmonologist in Sharon, CT, in 2002, who determined the cause of his illness to be Emphysema.

One must know the nature of an injury before attempting to enforce a claim. *See* Pritzlaff v. Archdiocese of Milwaukee, 194 Wis.2d 302, 533 N.W. 2d 780 (1995); Sopha v. Owens-Corning Fiberglass Corp., 98-1343 Sup. Ct. Wisc. (2000). The knowledge of the injury must be on the basis of objective facts. Probate Estate of Raymond Krause et al. v. Shell Oil., et al., Case No. 96-CV-72144-DT, 1/30/98. Reasonable diligence under the Discovery Rule is only applicable under negligence cases. Salinas v. Gary Pools, Inc., SW 3rd, 2000 WL 1344509 (4th Court of Appeals-San Antonio, TX) (September 20, 2000). Since injuries under SAA or BIA do not require proof of negligence, Swindell was not obligated to file an action until he actually knew what his injury was, i.e. when diagnosed in 2002 with Emphysema. This was a material fact in dispute and should have been determined by a jury. Michael v. Norfolk Southern Railway Company, U.S.C.A., 11th Cir. No. 94-9373-94-9375 (Feb. 6, 1996); Augusta. Iron and Steel Works, Inc. v. Employers Insurance of Wausau, 835 F.2nd 855, 856 (1 lth Cir. 1988). "When the disease manifested itself was a question of fact not subject to resolution by summary judgment". Celotex Corp. v. Copeland, 471 So.2d 533, 539 (Fla. 1985); Copeland v. Armstrong Cork Co., 447 So.2d 926 (Fla. 3d 1984).

Swindell did not learn of his emphysema injury until diagnosed in 2002. There is no evidence that Swindell knew of any diagnosis of COPD or what that encompassed. In his deposition, Dr. Shrager testified that he did not report his findings to Swindell, but to Dr. Krainston. Swindell was aware that he perhaps had pulmonary harm, even though the Appellee's expert said he did not, but attributed his discomfort to fibrosis damage from asbestos and essayed to recover for that. Finally, after diligent search, he found the true cause of his injury in 2002 after seeing a capable pulmonologist. The accumulated effects amounting to sufficiency to recover or establish emphysema did not manifest themselves until then. Associated Indemnity Corp. v. Industrial Accident Commission. 124 Cal. App. 378, 12 P.2d 1075.

These are matters for a jury to decide. Swindell has been deprived of his right to a trial by jury under the U.S. Constitution. The Appellees'

arguments relative to res judicata are specious. There has been no decision in a prior case regarding the nature of the injury suffered and none relative to the injury of emphysema, only incorrect findings relative to the statute of limitations. Statute of Limitation arguments have no place in this action. There has been no ***res judicata*** involved since Swindell has never been accorded his right to a trial under the Constitution and no prior actions relative to emphysema injury have been adjudicated.

Swindell has suffered multiple injuries from multiple causes manifested at various times. Second injuries can arise and are not barred by prior judicial proceedings. Indeed the Court below specifically stated that it was not interested in matters contained in the previous lawsuits and they should not be referenced unless absolutely necessary. However, the Appellees have chosen to ignore this directive and have based the majority of their pleadings on what had been forbade.

SUMMARY

1. The expressed will and intent of Congress must be honored and not be thwarted. Congress specifically omitted a Statute of Limitation in SAA and BIA, and in 100 years has not amended the Acts to insert one. Other courts have erred in attributing to Congress what it never intended or expressed.

2. Material facts in dispute must be resolved by a jury. Bailey v. Central. Vermont Ry., 319 U.S. 350 (1943). The right to trial by jury is a basic and fundamental right of our system of jurisprudence. Bailey v. Central Vermont Ry., supra. It is the function of the jury, not the court, to weigh the evidence and come to a conclusion. Tennant v. Peoria & P.V. Ry. Co., 321 U.S. 29 (1943). There are issues of fact that are material present and before the Court that must be tried, issues that have not been tried before.

Therefor, justice demands that the decision of the District Court be reversed and the case remanded for trial on the merits.

CERTIFICATE OF COMPLIANCE

Appellant Pro Se, Swindell, Hereby certifies that the foregoing brief complies with Federal Rules of Appellate Procedure 32 (a)(7)(B)(ii).

Edward LeRoy Swindell
Edward LeRoy Swindell

EXTENSION ON TIME

I hereby certify that an extension of time was requested is writing and granted by telephone for filing until February 14, 2006 by the clerk's office, Eleventh Circuit.

Edward LeRoy Swindell
Edward LeRoy Swindell

CERTIFICATE OF SERVICE

I hereby certify that an extension of time and correct copies of this document were mailed this 14th day of February, 2006, to Eric L,. Leach, Esq. & Sean L. Mulhall, Esq., %. Milton, Leach, Whitrnan, D'Andrea, Charek & Milton, P.A., 815 South Main Street., Suite 200, Jacksonville, Florida 32207-8257.

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11.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO: O5-15731-DD

District Court No. 03-00435 CV-J-TEM

Edward LeRoy Swindell

Appellant Pro Se

-vs-

Florida East Coast Railway Company &
CSX Transportation Company

Appellees

INITIAL BRIEF OF APPELLANT

On Appeal from Summary Judgment from the United States District Court for the Middle District of Florida, Jacksonville Division

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STATUTES AND LAWS

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STATEMENT OF JURISDICTION

The basis for the District Court's jurisdiction was predicated upon diversity jurisdiction and violations of the following acts and laws of the United States:

Safety Appliance Act, 45 USC Sec. 1-16 et seq.

Boiler Inspection Act, 45 USC Sec 22-34 et seq.

Fifth, Seventh and Fourteenth Amendments to the U.S. Constitution The basis for this Court's jurisdiction is predicated upon 28 USC sec. 1291 as an appeal of a final order and judgment to the defendants in this action. Said judgment was filed on September 30, 2005. A NOTICE OF APPEAL was filed in timely fashion on October 18, 2005, and docketed on October 19, 2005.

STATEMENT OF FONT SIZE

The font style used in this Brief is Times New Roman (14pt.)

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues presented for appeal herein are:

1. Whether the District Court erred in holding that an individual can not bring an action under the Safety Appliance Act.

2. Whether a statute of limitations is tolled during an appeal of right.

3. Whether the "absolute duty" doctrine contained in the Safety Appliance and Boiler Inspection Acts obviates the need to impose a statute of limitations.

4. Whether an act of Congress can be amended by prior Acts with no specific expression or proof of Congressional desire or intent to so do.

5. Whether a separate and disparate injury is barred because of prior judicial action relative to other injuries or must this be a question for jury deliberation.

6. Whether two diseases with separate roots of causation be considered as two injuries supporting separate causes of action.

7. Whether the District Court erred in not presenting issues of material fact, such as onset of injury, to a jury, thereby depriving Plaintiff of rights under the Seventh Amendment of the U.S. Constitution.

8. Whether the District erred in applying *res judicata* involving prior decisions involving separate injuries.

STATEMENT OF THE CASE

On May 23, 2003, appellant filed an action in the United States District Court, Middle District of Florida, against the Florida East Coast Railway and the CSX Transportation Corporation, Appellee's herein, for damages for injuries suffered by himself and others of similar circumstances while employed and working for the defendant railroads in repair shops and on "line of road" between 1939 and 1952.

The injury suffered was and is:

Emphysema caused by emissions from defective equipment (blow cocks) on locomotives owned and operated by the defendant railroads.

The action was brought under the following Acts of Congress:

Safety Appliance Act

Boiler Inspection Act

This action is a culmination of a steady and prolonged attempt by the Appellant Swindell to achieve redress for his suffering at the railroads' hands.

Swindell was employed by defendant FEC from 1939 until 1952, commencing as a laborer in locomotive repair shops in St. Augustine, Florida, rising to the position of electrician and to become a Diesel Locomotive attendant on Line-of-Road working on locomotives owned by Appellee railroads and under supervision of each. Duties involved are more fully described in the Appendix herein.

Appellant first became aware of respiratory problems, which he attributed to asbestos exposure, on February 4, 1994. He filed an action in a state court in Dade County, Florida, on June 7, 1996, against the defendant, FEC, for damages under the Federal Employers' Liability Act. Subsequently, prior to trial, under direction of the court, Swindell voluntarily dismissed his case "without prejudice".

On September 11, 1998, Swindell, a long time resident of New work, filed an action in the U.S. District Court, Southern District, New York, to recover damages for Asbestos injury and also Emotional Distress, which was diagnosed as acute depression.

The District Court denied venue, even though formerly the FEC operated within New York, and this decision was upheld on appeal.

Subsequently, on February 29, 2000, Swindell filed an action on behalf of himself and others of similar circumstances in the U.S. District Court,

Middle District of Florida, Jacksonville Division to recover for damage from asbestos related injury and emotional distress.

On March 30, 2001, the District Court granted the FEC motion for summary judgment based on expiration of the statute of limitations. This decision was upheld by the present Court on appeal and certiorari was denied by the U.S. Supreme Court.

Examination by the FEC chosen physician cast doubt upon asbestos related injury and Swindell felt reasonably secure of serious illness. However, in October, 2002, Swindell had severe chest pains and distress and was examined at Sharon Hospital, Sharon, Connecticut. The resident pulmonologist diagnosed Swindell with Emphysema, undoubtedly resulting from prolonged exposure to fumes from defective equipment on the locomotives ridden and worked on during his employment by defendants. Based on this diagnosis and finally noting the source of injury, Swindell commenced this action within three years of learning the cause and extent of his injury.

It is the contention of the Appellant that the District Court below erred in granting summary judgment to the defendants for the reasons stated herein.

STATEMENT OF THE FACTS

Appellant-Plaintiff Pro Se, Swindell, was employed by the Florida East Coast Railway from January 1939 until 1952, first as an apprentice, then as a laborer, electrician, and Diesel Locomotive attendant. He worked in steam and diesel locomotive overhaul and repair shops in St. Augustine and Miami, Florida and also as "Line-of-Road on trains owned by the defendants that traveled between New York and Miami. As more fully described in the Appendix hereto, Swindell's duties required him to handle and be in close proximity to defective equipment on the locomotives which spewed forth dust debris and toxic substances.

It was the custom for the trains to change crews in St. Augustine and Miami. The trains customarily operated on an alternate day basis - one day it was a FEC owned and operated train and the next day it would be a CSX owned and operated train. Swindell would receive written orders regarding duties and equipment maintenance and repair upon boarding the train. Depending upon the day, these orders came from either a FEC or CSX supervisor. He was required to submit a report at the end of his run to whichever company supervisor was on duty that day.

Subsequent to his employment by the railroads, Swindell worked in the electrical field in various industries which did not risk exposure to asbestos or noxious substances.

In 1994, Swindell was diagnosed with having contracted asbestosis and in 1996 commenced actions against the FEC. In 1997, Swindell was also diagnosed as suffering from acute depression arising out of concern regarding the asbestosis condition.

A later examination by the expert witness employed by the defendant found no concrete existence of asbestosis, but Swindell continued to press forward with the emotional distress injury.

The actions based on the injuries of asbestosis and emotional distress

were denied in summary judgment decisions on the basis of statute of limitations expiring. It is of note that during the period from 1994 until 2000, Swindell was filed in a Court of Competent Jurisdiction for all but 3 years, 6 months and 21 days out of the 6 year period from diagnosis until the previous case filed in February, 2000.

In October, 2002, Swindell suffered an attack of acute chest pains requiring admission to the emergency room at Sharon Hospital, Sharon, Connecticut. While there, he was examined by an experienced pulmonologist who determined that he was suffering from Emphysema, undoubtedly caused by his railroad employment.

Having finally learned the nature in his injury, or at least one of them, Swindell filed the present action in the District Court, Middle District of Florida, Jacksonville, Florida, on May 23, 2003, against the two defendants in this action for injurious harm received while working with and in proximity to defective equipment on locomotives owned and operated by the defendants within the scope of his duties under the provision of the Safety Appliance Act and Boiler Inspection Act. The injury and harm was entirely separate from prior injuries real and claimed.

SUMMARY OF ARGUMENT

Appellant/Plaintiff Pro Se contends that the orders of summary judgment in favor of the defendants were in error because:

A private right of action is permitted under the Safety Appliance Act Safety Appliance Act imposes an absolute duty on railroads, requiring no proof of negligence.

No evidence presented that Congress intended to impose a statute of limitations on acts prior to FELA.

An act can not amend a later one.

A statute of limitations is tolled during an appeal of right.

Plaintiff has shown proper diligence in pursuing his claim and defendants have been on notice and not prejudiced.

Injury complained of is a separate and disparate one from others received and evidence from defendants shows agreement.

There may be issues of fact involved and, if so, they might better be presented to a jury for decision.

Appellant/Plaintiff Fro Se has been deprived of his rights to a trial by jury under the Seventh Amendment of the U.S. Constitution.

Decisions relative to separate and prior injuries do not act as *res judicata* in respect to later, separate injuries.

Appellant/Plaintiffs status relative to CSX is an issue best left to a jury. In any event, Safety Appliance Act covers employees and travelers.

ARGUMENT

It is the contention of the Plaintiff/Appellant, Swindell, that the Court below has made a number of errors of fact and law in this cause of action and that the Judgment Order rendered must be overturned and the District Court be instructed to grant Plaintiff/Appellant's motion for summary judgment or proceed to trial.

The District Court stated erroneously that there was no private right of action involved relative to the Safety Appliance Act or Boiler Inspection Act, yet there are myriad cases beginning in 1893, where employees and travelers have brought actions solely under the SAA and BIA, "the right of private action by an injured employee, even without the employer's liability act, has never been doubted." Texas, & P.RY.CO. v. Rigsby, 241 U.S. 33 (1916), Johnson v. Southern Pacific Company, 196 U.S. 1 (1904). "Violation of the Safety Appliance Act, even without the Federal Employers' Liability Act, gives rise to a cause of action on the part of an employee injured as the proximate result of that violation.", Herb v. Pitcairn, 324 U.S. 117 (1945), St. Louis, I. M. & S., R. Co. v. Taylor,, 210 U.S. 281 (1908), Pennell v. Philadelphia & R R Co 231 U.S. 675 (1914), Texas & P. RY Co. v. Rigsby, *supra*,(1916). "The Safety Appliance Act...has been liberally construed so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the act." Swinson v. Chicago,, St. P., M. & O. Ry. Co., 294 U.S. 529 (1935).

Safety Appliance Act and Boiler Inspection Act place, Absolute, duty on Railroads

The SAA and BIA are strict acts applying negligence per se, *San* Antonio & A.P.R.Co. v. Wagner, 241 U.S. 476, 484, rather than requiring proof of negligence or permitting contributory negligence or assumption of risk. A defective part, such as a "blow-down cock" automatically presumes fault on the part of the railroad. Texas & P.RY.CO., *supra*, St. Louis, I.M. & S.R.Co. v. Taylor, 210 U.S. 281, Great Northern R. Co. v. Otos, 239 U.S. 349, 351. The SAA legislation expanded the qualified duty of the common

law into "an absolute duty and carriers are liable to employees in damages whenever the failure to obey these Safety Appliance Laws is the proximate cause of injury to them when engaged in the discharge of duty" as determined by a jury. Lousiville & N.R., CO. v. Layton, 243 U.S. 617 (1917) Thus, there is no need of statute of limitation protection in those acts. Intent does not have to be proven, memory is not an issue, nor are witnesses involved. The only issue is the act itself that results in harm due to defective equipment. Further to this, there is no evidence that Congress ever intended to apply a statute of limitations to the two acts. The Safety Appliance Act " contains no statute of limitations" Herb v. Pitcairn *supra*. FELA was adopted after SAA and BIA, and if Congress wanted to extend statute of limitation protection it placed in FELA, it had the opportunity to so do, or could have amended the two acts, SAA and BIA. It is not within the purview of the judiciary to legislate or change legislation. As Chief Justice John Roberts clearly stated in his confirmation hearing, if Congress wishes to include provisions in its legislation, it should so state in a clear manner. "The Court should assume that the legislature means exactly what it says" Snohomish, v. Joslin, 513 P.2d 293 (1973). It is also hard to envision correctness of the Court's findings that FELA was amended by acts preceding it. That is a clear case of attempting to legislate rather than interpreting a legislative act. The fact that this has been done many times does not make the action correct. A multitude of wrongs does not make one right.

A Statute of Limitations is Tolled during Appeals

The Court has also erred in stating that a statute of limitations is not tolled during an appellate appeal. Statute of Limitations is tolled while action is alive as a matter of right. Clark v. Velsical Chemical Corp. , 110 N.C. App. 803, 431 SE2d 227 (1993), affd per curiam 336 N.C. 599, 444 SE2d 223 (1994)., 28 USCA Sec. 1367.

This case also clearly falls under the provisions of Burnett v. New, York Central R. Co., 380 U.S. 424 (1965), see Urie v. Thompson, 337 U.S. 163 (1949). Clearly, in the present case, the Plaintiff has not slept on his rights, but has been seeking justice since 1999, and the defendants in this action have been on notice of the Plaintiffs claims. To attempt to

rely on procedural defenses rather than substantive ones is contrary to the purpose and spirit of the legislative acts, SAA, BIA and FELA. Burnett v. New York Central R.Co., *supra*. Plaintiff has shown the proper diligence that "statutes of Limitation were intended to insure" and "should not be penalized by time consuming and justice-defeating technicalities" Goldlawr, Inc. v. Heiman, 369 U.S. 463,467, see also: Herb, v. Pitcairn, *supra*. The FELA limitation period is not totally inflexible. Glus v. Brooklyn Eastern Terminal, 359 U.S. 231, Burnett v. New York Central It Co. *supra*, Osbourne v. Unified States, 164 F.2d 767, Scarborough v. Atlantic, Coast Line R. Co., 178 F.2d 253, Frabutt it New York, C. & St. L.R. Co., 84 F.Supp. 460.

Even were this Court to hold that the Appellant/Plaintiff could not proceed under the SAA and the BIA solely, and even if this Court were to hold that the Statute of Limitations specified in FELA applied and were not tolled, it is the contention of Swindell that the suffered injury of emphysema for which he is seeking damages is a distinct, separate and disparate disease and injury discovered in 2002, well within the period proscribed by the limitation statute in relation to the present action.

The Court below has stated that Swindell falls under the "should have known" doctrine because some of his physicians entered COPD on his charts. Aside from the fact that there is no proof Swindell was knowledgeable of these entries, these entries could relate to a number of diseases or conditions, not just emphysema.

COPD is a condition, EMPHYSEMA is a disease

COPD is an umbrella covering a number of disparate diseases or conditions of a pulmonary nature. Among these diseases, that usually have different causes and treatments are:

CHRONIC LUNG CONDITIONS
Chronic Bronchitis
Emphysema
Asthma

Cystic Fibrosis
Sarcoidosis
Interstitial Lung Disease
Atelectasis
Pneumothorax
Lung Cancer
Asbestosis
Pneumoconiosis and Silicosis
Occupational Asthma
Allergic Alveolitis
Byssinosis
Industrial Bronchitis
Farmer's Lung
Silo-Filler's Disease
Pulmonary Embolism
Cor Pulmonale

Although caused by different internal and external forces or conditions and requiring often different treatment - in some cases there is no effective treatment - all these disparate ailments are commonly linked together under a catch-all cover of COPD while awaiting more specific diagnosis through biopsy, x-ray or CAT scan.

This process is similar to a person seeing a physician and complaining of a "belly ache". A physician could write on the chart that the patient complains of stomach pain, a condition, but that could cover a myriad of causes or illnesses:

gas build up
constipation
owel failure
ulcer
benign tumor
cancerous tumor
gall stones
appendicitis

ingestion of poisonous substance
ingestion of tainted food
a swallowed marble or other substance
rectal malfunction
pancreatic cancer
peritonitis

Some of these conditions or illnesses can be diagnosed and treated by an ordinary physician, but many require attention by a specialist. Similarly, many of the diseases and ailments comprising COPD can be diagnosed by a general physician, but most require the attention of a pulmonologist and possible testing. Some illnesses, such as emphysema can take many years to develop before they can be authoritively diagnosed. See Urie v. Thompson, 337 U.S. 163,171 (1949).

It is important to note that the Appellant/Plaintiff was seen by only two pulmonologists. One was the physician, Dr. Feingold, employed by a Defendant, FEC, who declared that the Plaintiff/Appellant was not suffering from asbestosis, and the other, Paul V. McGuire, M.D., authored the report of October, 2002, from Sharon Hospital diagnosing the Appellant/Plaintiff with emphysema.

After examination by the Defendant's physician, Dr. Feingold, the Appellant/Plaintiff had some reason to believe that he was free of debilitating illness, since Dr. Feingold stated there was no evidence of asbestosis. However, he faced later pulmonary problems and saw various physicians to discover a possible cause or cure. Unfortunately, these physicians were specialists in the care of hearts (Cardiologists) and although they could recognize the condition of COPD, they were not qualified in delineating which of the possible diseases were involved. In 2002, after suffering chest pains and shortness of breath more severe than any time before, Swindell was seen at Sharon Hospital Emergency Room, was X-Rayed, given a blood test and for the first time Swindell was diagnosed by a competent pulmonologist, Paul V. McGuire, M.D., and learned that he was suffering from emphysema. There is no evidence that Swindell had ever known of a diagnosis for emphysema nor

suspected it prior to this date. His injury occurred "only when the accumulated effects of the deleterious substance manifested) themselves" Associated Indemnity, Corp. v. Industrial Accident Commission, 124 Cal.App.378,381, 12 P.2d 1075,1076.,Urie v. Thompson, *supra*.. This discovery occurred on October 2, 2002, and the present action has been brought well within the three-year period required by the Statute under FELA. For this reason alone, the Order by the Court below must be reversed.

In a letter written on May 24, 2005, received from one of the defendants' attorneys, Appendix Exhibit A , there is a clear statement that the injury complained of in this case is not the same as the injuries in the prior cases. Thus, the defendants themselves concede that emphysema is a separate and distinct illness, are not contesting the 2002 onset. The only question then is whether the injury complained of in this present action and learned of by Swindell within the past three years was caused by and during Swindell's employment under the Defendants and that must be a question for a jury to determine. Swindell has never contended that emphysema and asbestos were cause and effect.

ISSUES OF MATERIAL FACT MUST BE DECIDED AT TRIAL

The onset of disease is a factual issue to be decided at trial. Tullius v. Albright, 240 Fad 1317, TheraTx. Inc. v. Duncan, slip p. 839, 234 F.3d 1240. Genuine issue of material fact regarding when railroad employee determined that cause of his hearing loss was related to his employment with railroad precluded summary judgment for railroad. Hassel v. Missouri Pacific R.Co., Tex. App..-Tyler 1994,880 S.W. 2d 39, CSX Trans.,Inc. v. Adkins, GA. 1994, 442 S.E. 2d 737, 264 GA. 203, cert. Denied 115 S.Ct 357, 513 U.S. 947, Asparicio v. Norfolk &Western Ry. Co., C.A. 6 (Ohio) 1996184 F.3d 803.

Defendants have submitted an affidavit of a Doctor Philip Richard Saleeby (see Appendix Exhibit B) which would appear to obviate their relying on the statute of limitation argument. If they are relying on Dr

Feingold and Dr. Saleeby to aver that the Plaintiff was not suffering illness three years before the present action, then, when those affidavits are coupled with the May 24, 2005, letter from their attorney, the statute of limitations is not an issue in this case and the only consideration was whether the Plaintiff was injured by the Defendants. This issue has to be decided at trial and is not a subject for summary judgment. There certainly appears to be differences among the parties regarding the facts of the cause and onset of Plaintiffs injuries and these factual issues must not be decided by a district court on summary judgment, but the legal conclusion is one best left to juries. Parker v. Worcester Ins. Co., U.S. court of Appeals, 1st Cir., No. 004815, April 23, 2001. It is worth noting that the data submitted relative to Dr. Saleeby was not brought to Swindell's attention, nor was there a deposition taken.

Res judicata Does Not Apply

Plaintiff/Appellant has brought actions for three separate and disparate tort injuries occurring at different periods of time: asbestosis,, emotional distress and emphysema.

Injury due to asbestosis was the substance of the initial case in the Florida State court and in the District Court in New York. Based on the findings of the Defendant's physician, Dr Feingold, that there was no evidence of asbestosis, Plaintiff/Appellant proceeded on the emotional distress injury in the preceding case in Florida District Court in 2000. In the present case, Plaintiff/Appellant is charging the Defendants with inflicting injury resulting in emphysema. Defendants' own expert witness, Doctor Saleeby, differentiates between asbestosis and emphysema, stating that they are separate conditions or diseases springing from different causes. We thus have a situation where there are three separate injuries resulting from the Defendants' actions that the Plaintiff/Appellant became aware of at three different periods of time. When Plaintiff/Appellant learned or should have learned that he was suffering from emphysema is a genuine issue of fact. The only evidence in the record is a diagnosis of emphysema in October, 2002. White v. Mercury Marine, Division of Brunswick, Inc., 129 Fad 1428 (11th Cir. 1997), cited by the Court, is

not applicable since it dealt with only one injury that worsened over time. In this case there were separate injuries and the Defendants so claim and acknowledge as well. Clearly, there is no res judicata relative to the injury resulting in a diagnosis or illness of emphysema. "A claimant in an asbestos case cannot know all the injuries when the earlier manifested harms appear and consequently cannot sue for all damages at one time. Under these circumstances... the interest in the finality of judgments is outweighed by the needs of claimants." Sopha v. Owen-Corning Corporation, 98-1343 Wis (1999). At the least this is a matter best left to a jury to determine. See: Sopha v. Owen-Corning Corporation, *supra*, Hansen v. A.H. Robbins, Inc., 113 Wis 2d 550, 335 N.W.2d 578 (1983). If, as the Defendants aver, emphysema differs from asbestos and deny responsibility, there is no *res judicata* involved in the present action.

Plaintiff Appellant's Employee Status re CSX

As the court did not rule on this matter, Plaintiff/ Apellant does not motions submitted to the District Court. It is of note that SAA and BIA both cover injuries to *employees, and travelers*, on railroad lines. Pennell v. Philadelphia & R R Co, *supra.*

Plaintiff/Appellant has requested information from both Defendants under the Discovery process relative to possible agreements between them as to operations, but they have declined to produce any material at all. Indeed, their response makes a mockery of the discovery process in that they claim that there never was any agreement covering their joint purchase of locomotives or the staffing of same. According to them, crews of one railroad apparently just happened to decide to switch places with crews of the other on a regular basis without any supervision, an absurd notion at best and contrary to practice. Swindell was under Atlantic Coast Line (ACL) supervision while on the road and received written orders he was required to obey. Failure to provide the requested information is a severe hindrance. Again, it must be noted that the SAA applied to employees and *travelers* on railroads and there is no denial of the fact that Swindell regularly traveled on both defendants' trains.

SUMMARY

1. A railroad employee does have a private right of action under SAA.

2. The SAA and BIA acts imposed an absolute duty and liability on the railroads for injuries suffered by railroad employees, therefor, no statute of limitations is required to be imposed.

3. If Congress desired to impose a statute of limitations in the SAA, it should and could have done so and it is not up to the judiciary to change or alter legislation.

4. A prior Act can not amend a later one, at least without Congressional action.

5. Statute of Limitations are tolled during appeals of right.

6. Plaintiff has not "slept on his rights" but has shown proper diligence in seeking relief.

7. Emphysema, asbestosis and emotional stress are separate and disparate illnesses that have occurred at separate periods of time. Onset of Emphysema occurred and was discovered by Swindell well within the three year statute of limitation period even were the Court to hold the statute applicable. Although apparently conceded by the Defendants, this is a matter more appropriately to be determined by a jury.

8. *Res Judicata* is not involved in this proceeding since the injury complained of in the present action is a separate one, as conceded by the Defendant Railroads, and differs in substance, cause and instance from prior injuries and qualifies under the "second illness" rule.

9. Plaintiff/Appellant is prepared to prove he acted as an

"employee" of the Defendant CSX and also as a traveler. This is an issue for a jury to decide.

10. Plaintiff/Appellant has been denied his rights under the Seventh Amendment of the United Sates Constitution for a trial by his peers.

Plaintiff/Appellant feels like a reincarnation of Sisyphus in his search for justice. He has suffered injuries requiring expensive hospitalization and extensive medical care. His rights to a jury trial under the 7th Amendment of the United States Constitution have been compromised. He has suffered a multitude of injuries at the hands of the defendants and feels entitled to redress. He has offered Arbitration, has offered mediation, has offered settlement, but to no meaningful avail. He but wishes his day in court.

CONCLUSION

For any and all of the reasons contained herein, Plaintiff/Appellant begs that the order of the District Court be overturned and reversed and the case remanded for either a positive ruling on his motions for summary judgment, for trial on the merits or such remedy as this Court deems appropriate.

Respectfully submitted,

Edward LeRoy Swindell
Edward LeRoy Swindell
Appellant/Plaintiff Pro Se
50 Clubhouse Road, KLAC
Key Largo FL 33037
Telephone: 305-367-2011
Facsimile: 305-367-4847

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of this brief were mailed this day of November, 2005, to Eric L Leach, Esq. & Sean L Mulhall, Esq., %Milton, Leach, Whitman, D'Andrea, Charek & Milton, PA, 815 South Main Street, Suite 200, Jacksonville, Florida 32207-8257.

Edward LeRoy Swindell
Edward LeRoy Swindell
Appellant/Plaintiff Pro Se

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of this brief were mailed this 12th day of November, 2005, to Eric L. Leach, Esq. & Sean L. Mullhall, esq., o/o Milton, Leach, Whitman, D'Andrea, Charek & Milton, P.A., 815 South Main Street, Suite 200, Jacksonville, Florida 32207-8257.

Edward LeRoy Swindell
Edward LeRoy Swindell
Appellant/Plaintiff Pro se

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO: O5-15731-DD

District Court No. 03-00435 CV-J-TEM

Edward LeRoy Swindell

Appellant Pro Se

-vs-

Florida East Coast Railway Company &
CSX Transportation Company

Appellees

APPENDIX

On Appeal from Summary Judgment from the United States District Court for the Middle District of Florida, Jacksonville Division

---

Edward LeRoy Swindell
50 Clubhouse Road
Key Largo, FL 33037
Telephone: 305-367-2011

Appellant/Plaintiff Pro Se

E. LeRoy Swindel
50 Clubhouse Road
Key Largo FL 33037

December 305-367-2011

United States Court of Appeals
Eleventh Street N.W.
Atlanta GA 30303

Attn: Mary L. Marshall
Clerk's Office

Re: Appeal Number: 05-15731-DD
Edward LeRoy Swindell v- Florida, East Coast
District Court Number: 03-00435 CV-J-TEM

Enclosed please find seven (7) copies of my corrected brief containing the date of original service on the parties as requested on your letter of November 23, 2005.

I further certify that copies of the corrected brief have been served on Eric Leach and Seas Mulhall, attorneys for the Defendants in this action on this date:12/5/2005

Please note, as previously requested, my temporary change of address. Your letter of November 23rd was not received by me until December 2nd due to US postal Service forwarding delays.

Sincerely

Edward LeRoy Swindell
Edward LeRoy Swindell

Cc: Eric Leach, Esq.
Sean Mulhall, Esq.

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

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November 23, 2005

Edward LeRoy Swindell
PO BOX 36
MILLBROOK NY 12545-0036

Appeal Number: 05-15731-DD
Case Style: Edward LeRoy Swindell v. Florida East Coast
District Court Number: 03-00435 CV-J-TEM

THIS CIVIL APPEAL IS GOVERNED BY MORE STRINGENT PROCEDURES FOR REQUESTING EXTENSIONS OF TIME TO FILE BRIEFS AND RECORD EXCERPTS. RULES PROVIDE FOR DISMISSAL WITHOUT FURTHER NOTICE WAN A BRIEF OR RECORD EXCERPTS IS NOT FILED OR CORRECTED WITHIN THE TAME PERMITTED. PLEASE SEE THE CIRCUIT RULES AT WWW.CA11.USCURTS.GOV.

The brief filed by you in the referenced appeal is deficient because you have not included the required item(s) noted below.

Please submit seven (7) copies of Certificate of Service containing the date served upon opposing party.

One copy of your brief has been filed, subject to receipt of seven (7) copies of a corrected brief within FOURTEEN (14) DAYS from this

date. If you intend to make the corrections to the existing briefs, you may contact the clerk's office to make arrangements for their return. You may, instead, submit a new set of briefs which include the necessary corrections. If appellant fails to file a timely corrected brief, the appeal will be dismissed. See 11 th Cir. R. 42-1(b), 42-3. If appellee flails to file a timely corrected brief, appellee will not be heard at oral argument unless otherwise ordered by the court. See 11th Cir. R. 42-3(f), The corrected brief must be served on all parties to this appeal. HOWEVER, DO NOT AMEND THE ORIGINAL CERTIFICATE OF SERVICE.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Mary L. Marshall (404) 335-6223

Encl.

NOTES

Note 1: CFR Ch. 11 230. 16 Lagging To Be Removed

"The jacket an lagging shall be removed at least once every 5 years and a thorough inspection made of the entire exterior of the boiler while under hydrostatic pressure. The jacket and lagging shall also be removed whenever an account of indication of leaks the United States Inspector of the railroad company inspector considers it desirable or necessary.

Note 2: 49 CPR Ch. 11 § 230.50 Leaks in Front of Enginemen.

All steam valves, cocks, and joints, studs, boas, and seams shall be kept in such repair that they will not wit steam

Note 3: 49 CFR Ch. II § 229.1 Subpart A - General

This part prescribes minimum Federal Safety Standards for all locomotives except those propelled by sue steam power.

Note 4: 49 CPR Ch. 11 § 229,41 Subpart C -- Safety Requirement Protection Against Personal Injury.

", .. exposed moving parts of mechanisms ... to prevent personal Injury,"

Note 5: 49 CFR Ch. 11 § 229,45 Ditto "Note 4"

"General conditions - all systems and components on a 'locomotive shall be free of conditions that endanger the safety of the crew, locomotive or train ... these conditions include: insecure attachments of components, including steam, and other leaks and accumulation

Note 6: 49 CFR Ch. 11, § 229.5 (m)

"Serious injury means an injury that results in amputation. of

any appendage, the loss of sight in an eye, the facture of a bone, or confinement in a hospital for a period of more than 24 consecutive hours,"

Employee Duties

Work Description at Millers Shop (Locomotive Shop)

The duties of the plaintiff while working as a laborer at beer Shops was to remove asbestos lagging from the boiler in accordance with CPR' 49 for when leaks occurred. This asbestos lagging was either stored or ground-up to make asbestos mortar for use as mortar for insulation between asbestos lagging when the lagging was reinstalled. Should a serious steam leak develop under the lagging, and examination mast be made and the leak located and the boiler !trust be taken out of service at once and thoroughly repaired pursuant to the rules. (')

Work Description at Millers Shops (Coach Shop)

The duties of the plaintiff working as an electrician in the Coach Shop on passenger cars consisted of removing and repairing all types of electrical equipment: generators, motors, fans, lighting fires, batteries. The work was under and on the inside of coaches in for repair and/or overhaul,

Work Description While Operating Equipment on Line-of-Road Safety Standards

The duties of the Diesel Locomotive attendant on Line-of-Road was to operate the steam boiler (steam generator) in accordance with the rules and regulations of the Interstate Commerce Commission (1) with particular attention to CFR 49: Transportation, subtitle A and B Chapters I, II, 229, 102-131

The instructions for the operation of the steam generator requires that it be operated at a safe working pressure with a minimum safety factor of

four and equipped with an operable test valve or other means of determining whether the steam generator is filled with water. a, 229, 103

It was necessary that the plaintiff make inspections and sign reports on the locomotive in use. Each locomotive inspected after each trip and a report made-out and all defects found and reported on an approval form. a, 230. 104

The plaintiff General Requirements of ,Safety protection came under the CFR Ch. ! I § 229.4) and the definition of (m) serious injury came under § 229.41 and the definition of (m) serious injury came under § 229.5 (m) (6)

Plaintiff's Memorandum of Law
Summary Judgment

Genuine issue of material fact existed as to whether former railroad employee's 1992 injuries were separate from 1987 injury to his right hand, precluding summary judgment on issue of whether throe-year FELA statute of limitations barred claim relating to 1992 injury. Aparicio v. Norfolk & Western Ry. Co., C.A.6 (Ohio) 1996, 84 F.3d 803.

Genuine issues of material fact as to whether pain in railroad employee's feet should have caused him to seek medical attention sooner than he did such that he would have discovered that his injury, namely, Morton's neuroma, precluded summary judgment, in employee's FELA action, based on statute of limitations, even though employee knew more than three years before filing action that his feet hurt due to walking on slag in railroad yard. Ray v. Illinois Central R. Co., E.D.La. 1994, 864 F. Supp. 569.

Genuine issues of material fact existed, precluding summary judgment for employers and for manufacturers of asbestos related materials, as to when employee's widow had sufficient information to indicate that employee's illness and death might have been asbestos related for purposes of determining' date on which cause of action accrued. Curry v. Consolidated Rail Corp., W.D.Pa. 1991, 766 F. Supp. 380.

Genuine issue of bet existed, as to whether employees, who worked at diesel locomotive shop, recap" injury and causation more than three years prior to their bringing of suit against employer, for purposes of three-year statute of limitations under the Federal Employers Liability Act, even though they had many symptoms of work-induced "toxic Encephalopathy," a degenerative brain disease, for years; medical expert stated that symptoms of exposure were not injurious and were not the same as symptoms of disease, which is purely latent, and that individual may suffer symptoms of exposure for years without or before developing chemically caused injury or disease. CSX Transp." Inc. v. Adkins, GA.. 1994, 442 S.E"2d 737, 264 A. 203, certiorari denied 115 S. Ct. 357, 513 U.S. 947, 130 L. Ed. 2d 311.

Genuine issue of material fact regarding when railroad employee determined that cause of his hearing loss was related to his employment with railroad precluded summary judgment for railroad in FELA action. Hassel v. Missouri Pacific R. Co., Tex, App.-Tyler 1994, 880 .W 2d 39, rehearing denied, writ denied.

RE: 3YR. STATUS OF LIMITATIONS

			IN COURT	NOT IN COURT
	2/4/94	DIAGNOSED-ASBESTOSIS DR. KRAISON		
				2YRS. 3 MNS
	3/16/96	FILED CASE-STATE COURT IN MIAMI,FLO.		
			2 YRS. 3MNS	
	6/15/98	FILEDFOR DISCONTINUED IN MIAMI		
YEARS 21 DAYS				0 YRS. 3 MNS
	9/11/98	FILED IN US DIST COURT. WHITE PLAINS N.Y.		
			1YR. 3MNS	
	12/13/99	U.S. COURT OF APPEAL DICES. NEW YORK CITY-2ND DIST		
				0 YRS. 2 MNS
	2/25/00	FILED IN DIST COURT-JAX 11TH DIST		21 DAYS
			3YRS. 6 MNS	2YRS. 8 MNS 21 DAYS
YEARS 21 DAYS		NOTE: OUT OF SIX YEARS, THERE WAS ONLY <u>TWO YEARS EIGHT MONTHS THAT THE MATTER WAS NOT IN A COURT OF CONPETENT JURISDICTION</u>		

United States Court of Appeals
Eleventh Circuit
56 Forsyth Sired, NW.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

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November 07, 2005

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 05-15731-DD
Case Style: Edward LeRoy Swindell v. Florida East Coast
District Court Number: 03-00435 CV-J-TEM

THIS CIVIL APPEAL IS GOVERNED BY MORE STRINGENT PROCEDURES FOR REQUESTING EXTENSIONS OF TIME TO FILE BRIEFS AND RECORD EXCERPTS. RULES PROVIDE FOR DISMISSAL WITHOUT FURTHER, NOTICE WHEN A BRIEF OR RECORD EXCERPTS IS NOT FILED OR CORRECTED WITHIN THE TIME PERMITTED. PLEASE SEE THE CIRCUIT RULES AT WWW.CA11.USCOURTS.GOV.

Eleventh Circuit Rule 31-1 requires that APPELLANT'S BRIEF AND RECORD EXCERPTS BE SERVED AND FILED WITHIN FORTY (40) DAYS FROM October 19, 2005.

The above date is the date the appeal was docketed in the court of appeals, as provided by 11th Cir.R.12-1.

THIS IS THE ONLY NOTICE YOU WILL RECEIVE CONCERNING THE DUE DATE FOR FILING BRIEFS. See Fed.R.App.P. 28, 30, 31 and 32, and the corresponding circuit rules, for farther formation on preparing briefs and record excerpts. If you have not entered your

appearance in this appeal, please note that the clerk may not accept your motions or other filings . See 11th Cir. R. 46-1(e). Appearance forms are available on the court's Web site at www.ca11.uscourts.gov. Motions for extensions of time to file a brief are frowned upon by the court.

In addition to providing the required number of paper copies of briefs, all parties (except pro se parties) are required, additionally, to provide briefs in electronic format as described in 1 Ith Cir. R. 31-5 and the instructions provided on the court's website, Electronic briefs must be in Adobe Acrobat® PDF file format. The electronic brief must be completely contained in one PDF file, Le., cover page through and including the certificate of service. The address wrapper accompanying this letter contains counsel's individual identification number (User ID) for electronic brief uploading. When uploading a brief for the first time you will be prompted to register and create a password known only by you for all future uploads.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Lois Tunstall (404) 335-6173

BR-1 CIV (07-2005)

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Subject:Activity in Case 3:03-cv-00435-TEM Swindell v. Florida East Coast, et al "Judgment"
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U.S. District Court
Middle District of Florida

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Case Name: Swindell v. Florida East Coast, et al
Case Number: 3:03-cv-435 https://ecf.flmd.uscourts.gov/cgi-bin/DktRpt.pl?23389

Document Number: 46
Copy the URL address from the line below into the location bar of your Web browser to view the document:
https://ecf.flmd.uscourts.gov/cgi-bin/show_case_doc?46,23389" MAGIC,

Docket Text:
JUDGMENT in favor of FEC and CSXT Signed by Deputy Clerk on 9/30/2005. (JLM,)

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4fb60e75dadlb4eb4a8948aa6101bbbfc9d656bed2b4ld7fO72e888aed
c8708e6ab6ae]]

3:03-cv-435 Notice will be electronically mailed to:
Eric L. Leach eleach@miltonleach.com, tkueneman@miltonleach.com

Sean Lawrence Mulhall smulhall@miltonleach.com,

3:03-cv-435 Notice will be delivered by other means to:
Randall A. Jordan
Jordan & Moses
1804 Federica Rd., Suite C
St. Simons Island, GA 31522

Edward LeRoy Swindell
#
Tower Hill Rd.
P.O. Box 36
Millbrook, NY 12545-0036

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

EDWARD LEROY SWINDELL,

Plaintiff,

-vs- **Case No. 3:03-cv-435-J-TEM**

FLORIDA EAST COAST RAILWAY; CSX TRANSPORTATION CORPORATION,

Defendants.

_____/

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that pursuant to this court's order entered September 28, 2005, judgment is hereby entered for Defendants FEC and CSXT.

Date: September 30, 2005

SHERYL L. LOESCH, CLERK

___Janet McLemore___
By: Deputy Clerk

Copy to:

Counsel of Record
Unrepresented Parties
A84

Exhibit A

MILTON, LEACH, WHITMAN,
D'ANDREA, CHAREK & MILTON, P.A.
ATTORNEYS AND COUNSELORS
815 SOUTH MAIN STREET, SUITE 200
JACKSONVILLE, FLORIDA 32207-8157

JOSEPH P MILTON
ERIC L. LEACH
JOSHUA A. WHITMAN
JAMS L. D'ANDREA
NICHOLAS C. CHARECK
MICHAEL P. MILTON
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RUTH G. THOMPSON
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ADVOCATE BY THE NATIONAL
BOARD OF TRAIL ADVOCACY

May 24, 2005

Kenneth A. Tomchin, Esquire
TOMCHIN & ODOM, P.A.
8833 Perimeter Park Blvd., Suite 104
Jacksonville, FL 32216

Re: Swindell v. FEC
Our File No.: 51.03086

Dear Ken;

I spoke with the Director of Claims at FEC who was not willing to offer any money to settle this case. I have not heard back from CSXT, but expect a similar reply based upon the claim that Mr. Swindell developed "asbestos related emphysema," which is not an asbestos related disease. I will contact you when I hear from CSX, but do not believe mediation will be useful. With best regards.

Very truly yours,

Eric L. Leach
Eric L. Leach

ELL:tmk

EXHIBIT B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

EDWARD LEROY SWINDELL,
and others of Similar circumstances,

Plaintiff,

-vs- Case No. 3-03-CV-435-J-25 TEM

FLORIDA EAST COAST RAILWAY, LLC.
and CSX TRANSPORTATION INC.

Defendants.
_____/

NOTICE OF FILING AFFIDAVIT OF DR. PHILIP RICHARD SALEEBY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, Florida East Coast Railway, LLC and CSX Transportation, Inc., by and through their undersigned counsel and pursuant to Federal Rules of Civil Procedure, hereby give notice of filing the original Affidavit of Dr. Philip R. Saleeby in support of Defendants' Motions for Summary Judgment.

Respectfully submitted,

MILTON, LEACH, WHITMAN, D'ANDREA, CHAREK & MILTON, P.A.

Sean L. Mulhall
Eric L. Leach, Esquire
Florida Bar No. 745480
Sean L. Mulhall, Esq.

Florida Bar No. 0153966
815 S. Main St., Suite 200
Jacksonville, Florida 32207
Telephone (904) 346-3800 Fax (904) 346-3692
Attorneys for Defendants, FEC and CSXT

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2004, I presented the foregoing to the Clerk of the Court for filing and uploading-to the CM/ECF system which will send a notice of electronic filing to Sean L. Mulhall. I further certify that I mailed the foregoing document and the notice of electronic filing by first class mail to the following non CM/ECF participants: Edward L. **Swindell, Millbrook, New York, 12545.**

Sean L. Mulhall
Sean L. Mulhall

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

EDWARD LEROY SWINDELL,
and others of Similar circumstances,

Plaintiff,

-vs- Case No. 3-03-435-J-25 TEM

FLORIDA EAST COAST RAILWAY; LLC.
and CSX TRANSPORTATION INC.

Defendants.
_____/

AFFIDAVIT OF DR. PHILIP RICHARD SALEEBY

STATE OF FLORIDA

COUNTY OF DUVAL

BEFORE ME, the undersigned authority, personally appeared, Dr. Philip Richard Saleeby, and who after having been duly sworn, deposes and says:

1. My name is Dr. Philip Richard Saleeby and I am above the age of 18 years and have personal knowledge of the matters set forth herein. I am a Board-Certified, Internal Medicine Specialist. I specialize in the practice of Pulmonary Diseases having completed my fellowship at Tulane University, Charity Hospital, in 1975. I have attached a copy of my curriculum vitae to this affidavit.

2. For the past 29 years I have diagnosed and treated numerous patients for asbestos related disease.

3. I have researched and kept abreast of the scientific and medical literature concerning asbestos related disease, including the types of disease caused by asbestos exposure.

4. I have been asked to offer opinions on the question of whether Chronic Obstructive Pulmonary Disease ("COPD"), including Emphysema, is causally related to asbestos exposure.

5. I have also been asked to comment on whether there is medical evidence supporting a diagnosis of COPD for Mr. Edward Swindell. I have been supplied medical records on Mr. Edward Swindell which include a consultation by Dr. Bernard R. Schrager on May 6, 1999, from the Miami Cardiology Group listing "possible asbestosis, sleep apnea, and COPD" in the problem list. His chest exam revealed "lung fields are clear" with rare dry crackles . . . at the bases". A note from Dr. Schrager on January 15, 1998, details that Mr. Swindell "could not tolerate a CPAP mask" and that he was seen by a pulmonologist. His chest was "clear". A letter on December 21, 1998, detailed that Dr. Schrager was getting a chest consult to "evaluate severity of underlying pulmonary disease". These records tell me that has sleep apnea, and carries a diagnosis of COPD. However, there are no pulmonary function results, smoking history, or chest film reports in the records I reviewed to tell me that he has COPD.

6. Chronic Obstructive Pulmonary Disease consists mostly of two diseases: 1. Emphysema is a destructive disease of the airspaces causing enlargement, destruction, cysts, hyperinflation, and loss of elastic recoil of the lungs. 2. Chronic Bronchitis is an inflammatory disease of the airways producing a daily cough productive of phlegm of different colors at times. COPD is caused almost entirely by smoking. A significant smoking history causing COPD would be between 10-20 pack years. Rarely, Emphysema can be seen in the non-smoker caused by alpha-one-antitrypsin deficiency and by second hand smoke either at home or in the workplace.

7. COPD is a disease which enlarges the lung volumes leading to hyperinflation.

Asbestos inhalation on the other hand, leads to a decrease in lung volumes due to fibrosis of the lung itself. In COPD the lungs enlarge while in asbestosis, the lungs shrink due to the chronic scarring. Asbestos does NOT cause COPD. The lungs become obstructive in COPD while with asbestos the lung disease is restrictive. The functional significance of each is directly opposite.

FURTHER AFFIANT SAYETH NAUGHT

_____

Dr. Philip Richard Saleeby - Affiant

Sworn to and subscribed before me
This 28 day of May, 2004.

Debora L. Stewart
Notary Public
State of georgia

Name:
Commission No.:
Commission Expires:

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

EDWARD LEROY SWINDELL,
and others of Similar circumstances,

Plaintiff Pro Se

-vs- Case No. 3:03-cv-435-J-TEM

FLORIDA EAST COAST RAILWAY; LLC.
and CSX TRANSPORTATION INC.

Defendants.
_____/

NOTICE OF APPEAL

Notice is hereby given that Edward LeRoy Swindell, Plaintiff Pro Se hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Judgment rendered September 28, 2005, and entered September 30, 2005.

I hereby certify that copies hereof have been furnished to the attorneys for the defendants, Eric L. Leach, Esq. and Sean L.. Mulhall, Esq., Milton, Leach, D'Andrea & Ritter, 815 South Main Street, Suite 200, Jacksonville, Florida, by U.S. mail on this 26 day of October, 2005.

Edward LeRoy Swindell
Edward LeRoy Swindell, Plaintiff Pro Se
P.O. Box 36, Tower Hill Road
Milbrook NY 12545
845-677-5991

Dated October 26, 2005

A92

STATE OF NEW YORK)
) ss.
COUNTY OF DUTCHESS)

On this 26th day of October 2005 before me came E. LeRoy Swindell, to me known, and duly sworn did acknowledge that he executed the foregoing instrument.

JENNIFER ANN MILLER
NOTARY PUBLIC

My Commission expires:

APPEAL, MAGTRL, SL DOC, TEM

U.S. District Court
Middle District of Florida (Jacksonville)
CIVIL DOCKET FOR CASE #: 3:03-cv-00435-TEM
Internal Use Only

Swindell v. Florida East Coast, et al
Assigned to: magistrate judge Thomas E. Morris
Demand: $3,000,000

Cause: 45:151 Railway labor Act

Date Filed: 05/23/2003
Jury Demand: Plaintiff

Nature of Suit: 368 P.I.: Asbestos
Jurisdiction: Federal Question

Plaintiff

Edward LeRoy Swindell andothers of similar circumstances

represented by **Edward LeRoy Swindell**
50 Clubhouse Rd
Key Largo, FL 33037
PRO SE

V.

Defendant

Florida East Coast Railway Company

represented by **Eric L. Leach**
Milton, Leach, Whitman, D'Andrea, Charek & Milton, P.A.
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Sean Lawrence Mulhall
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Defendant
CSX Transportation Corporation

represented by **Eric L. Leach**

(See above for address)
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ATTORNEY TO BE NOTICED

Randall A. Jordan
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1804 Federica Rd., Suite C
St. Simons Island, GA 31522
912/638-0505
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Sean Lawrence Mulhall
(See above for address)

		LEAD ATTORNEY ATTORNEY TO BE NOTICED
Date Filed	**#**	**Docket Text**
05/23/2003	1	COMPLAINT filed; jury demand Filing fee $150.00 Receipt # J11798 (spw) (Entered: 05/23/2003)
05/23/2003		MAGISTRATE JUDGE CASE ASSIGNMENT Magistrate assigned: Howard T. Snyder (spw) (Entered: 05/23/2003)
05/23/2003		SUMMONS(ES) issued for Florida East Coast, CSX Transportation. Consent(s) issued. (spw)(Entered: 05/23/2003)
06/05/2003	2	NOTICE to counsel of new case number and magistrate judge assignment (signed by deputy clerk) ctc (spw) (Entered: 06/05/2003)
06/05/2003		MAGISTRATE JUDGE CASE ASSIGNMENT Magistrate assigned: Marcia M. Howard (spw) (Entered: 06/05/2003)
06/10/2003	3	ORDER of recusal (Signed by Magistrate Judge Marcia M. Howard) ctc (spw) (Entered: 06/10/2003)
06/10/2003	4	NOTICE to counsel of new case number and magistrate judge assignment (signed by deputy clerk) ctc (spw) (Entered: 06/10/2003)
06/10/2003		MAGISTRATE JUDGE CASE ASSIGNMENT Magistrate assigned: Thomas E. Morris (spw) (Entered: 06/10/2003)

Date Filed	#	Docket Text
06/16/2003	5	RETURN of service executed as to CSX Transportation on 5/30/03; Answer due on 6/19/03 for CSX Transportation (spw) (Entered: 06/16/2003)
06/16/2003	6	NOTICE of designation under Local Rule 3.05 - TRACK 2. (ctc) (spw) Modified on 06/17/2003 (Entered: 06/17/2003)
06/19/2003	7	MOTION by CSX Transportation with memorandum in support to dismiss (converted to a motion for summary judgment per Order # 24) (spw) Modified on 02/26/2004 (Entered: 06/20/2003)
06/30/2003	8	REPLY by Edward LeRoy Swindell to [7-1] motion to dismiss and MOTION for summary judgment (spw) (Entered: 07/01/2003)
06/30/2003	9	RETURN of service executed as to Florida East Coast on 6/20/03; Answer due on 7/10/03 for Florida East Coast (spw) (Entered: 07/01/2003)
07/10/2003	10	MOTION by Florida East Coast with memorandum in support to dismiss (converted to a motion for summary judgment pursuant to Order #24) (slc) Modified on 02/26/2004 (Entered: 07/11/2003)
07/14/2003	11	MOTION by CSX Transportation with memorandum in support for leave to file a response to plaintiffs reply to defendant's motion to dismiss referred to Magistrate Judge Thomas E. Morris (jec) (Entered: 07/14/2003)

Date Filed	#	Docket Text
07/14/2003		RECEIVED proposed response re. #11. (jec) (Entered: 07/14/2003)
07/16/2003		MOTION(S) no longer referred: [11-1] motion for leave to file a response to plaintiffs reply to defendant's motion to dismiss (slc) (Entered: 07/16/2003)
07/18/2003	12	ORDER denying [11-1] motion for leave to file a response to plaintiffs reply to defendant's motion to dismiss (Signed by Judge Henry L. Adams Jr.) ctc (spw) (Entered: 07/18/2003)
07/22/2003	13	REPLY by Edward LeRoy Swindell to Florida East Coast Railway's [10-1] motion to dismiss and MOTION for summary judgment (slc) (Entered: 07/22/2003)
07/22/2003	14	MOTION by Edward LeRoy Swindell for leave to amend his [8-1] motion for summary judgment against CSX Transportation in response to CSX's response to plaintiffs motion for summary judgment (sic) (Entered: 07/22/2003)
07/28/2003	15	RESPONSE by Florida East Coast in opposition to [13-1] motion for summary judgment (spw) (Entered: 07/29/2003)
07/29/2003	16	RESPONSE by CSX Transportation in opposition to [14-1] motion for leave to amend his [8-1] motion for summary judgment against CSX Transportation in response to CSX's response to plaintiffs motion for summary judgment (sic) (Entered: 07/30/2003)

Date Filed	#	Docket Text
09/05/2003	17	CASE MANAGEMENT REPORT (jec) (Entered: 09/08/2003)
09/05/2003	18	CONSENT to trial by magistrate judge by Edward LeRoy Swindell, Florida East Coast, CSX Transportation (jec) (Entered: 09/08/2003)
09/10/2003		ENDORSED ORDER approving [18-1] Magistrate consent, and the case is referred to the assigned Magistrate Judge for all further proceedings (Signed by Judge Henry L. Adams Jr.) ctc (spw) (Entered: 09/10/2003)
09/10/2003 09/10/2003	19	NOTICE OF CASE REASSIGNMENT to the Honorable Magistrate Judge Thomas E. Morris. ctc (spw) (Entered: 09/10/2003) **MAGTRL flag (spw) (Entered: 09/10/2003)
01/08/2004	20	NOTICE to the Court pursuant to Local Rule 3.01(h), by CSX Transportation (spw) (Entered: 01/09/2004)
01/22/2004	21	NOTICE to the Court pursuant to Local Rule 3.01(h), by Florida East Coast (spw) (Entered: 01/22/2004)
02/10/2004	22	2ND NOTICE to the Court pursuant to Local Rule 3.01(h), by CSX Transportation (spw) (Entered: 02/10/2004)
02/18/2004	23	TELEPHONE MOTION HEARING held on 2/18/04 re: [10-1] motion to dismiss, [8-1] motion for summary judgment, [7-1] motion to dismis before Magistrate Judge Thomas E. Morris;

Date Filed	#	Docket Text
		Order to enter (spw) (Entered: 02/20/2004)02/
26/2004	24	ORDER: the Court will allow the parties a 60 day period from the date of the telephonic hearing to undertake appropriate discovery on whether plaintiffs condition alleged in this action is a separate disease or injury for purposes of determining when the statute of limitations began to run; discovery on any other matters is stayed; deferring [10-1] motion to dismiss (converted to a motion for summary judgment) pending receipt of additional materials in support, which may include a supplemental motion for summary judgment and supplemental briefing by 4/29/04 with response due 5/14/04; deferring [13-1] motion for summary judgment pending receipt of additional materials in support of the summary judgment and supplemental briefing by 4/29/04 with response due 5/14/04; deferring [7-1] motion to dismiss (converted to a motion for summary judgment), with deadlines to be established later for submission of supplemental materials; however, plaintiff and defendant CSXT have 30 days to advise the Court of the amount of time that would be required for discovery on this motion; deferring [8-1] motion for summary judgment with deadlines for the filing of supplemental materials to be established later; denying as moot [14-1] motion for leave to amend his [8-1] motion for summary judgment against CSX Transportation in response to CSX's response to plaintiffs motion for summary; setting dispositive motion filing deadline for 4/29/04 only on the issue of the 2nd disease and statute of limitations (Signed by Magistrate Judge Thomas E. Morris) ctc (spw)(Entered: 02/26/2004)

Date Filed	#	Docket Text
03/26/2004	25	RESPONSE by CSX Transportation to [24-2] order (map) (Entered: 03/29/2004)
04/21/2004	26	AGREED MOTION by Florida East Coast, CSX Transportation for entry of revised Order regarding discovery (agreed) (spw) (Entered: 04/21/2004)
04/27/2004	27	ORDER granting [26-1] consent motion for entry of revised Order regarding discovery; resetting scheduling order deadlines: medical record discovery cutoff 6/16/04; Deadline for filing amended dispositive motions 7/16/04 (Signed by Magistrate Judge Thomas E. Morris) ctc (spw) (Entered: 04/27/2004)
05/20/2004	28	NOTICE by Edward LeRoy Swindell of change of address for pro se party (spw) (Entered: 05/21/2004)
07/16/2004	29	MOTION and memorandum of law for summary judgment by CSX Transportation Corporation. (SPW) (Entered: 07/20/2004)
07/16/2004	30	MOTION to file exhibits under seal in support of motion for summary judgment, by CSX Transportation Corporation. (SPW) (Entered: 07/20/2004)
07/16/2004	31	MOTION for summary judgment and memorandum of law by Florida East Coast Railway Company. (SPW) (Entered: 07/20/2004)
07/16/2004	32	NOTICE of filing AFFIDAVIT of Dr. Philip

Date Filed	#	Docket Text
		Richard Saleby, re 29 MOTION for summary judgment, 31 MOTION for summary judgment by CSX Transportation Corporation, Florida East Coast Railway Company. (SPW) (Entered: 07/20/2004)
07/16/2004	33	MOTION to file exhibits under seal in support of motion for summary judgment, by Florida East Coast Railway Company. (SPW) (Entered: 07/20/2004)
07/16/2004		***Attorney Randall A. Jordan added for CSX Transportation Corporation. (SPW) (Entered: 07/20/2004)
07/23/2004	34	ORDER granting 30 Motion to Seal Document. Clerk is to seal exhibit to defendant's (CSX) motion for summary judgment; granting 33 Motion to Seal Document. Clerk is to seal exhibit to defendant's (FEC) motion for summary judgment.. Signed by Judge Thomas E. Morris on 7/22/2004. (WB,) (Entered: 07/23/2004)
07/23/2004		***Document sealed S-1 (MAP,) Modified on 7/26/2004 (SPW). Modified on 10/14/2005; UNSEALED per order #45, see document #47 (sms). (Entered: 07/23/2004)
07/26/2004		***Set/clear flags (sealed document) (SPW) (Entered: 07/26/2004)
07/26/2004		COPIES mailed to Counsel: Randall A. Jordan; Unrepresented Parties: Edward LeRoy Swindell re 34 Order on Motion to Seal Document (SPW) (Entered: 07/26/2004)

Date Filed	#	Docket Text
08/03/2004	35	REPLY to motion re 31 MOTION for summary judgment filed by Edward LeRoy Swindell. (Attachments: # 1 Exhibit A through G# 2. Exhibit H and J)(SPW,) (Entered: 08/05/2004)
04/13/2005	36	NOTICE by CSX Transportation Corporation *Notice to Court* (Mulhall, Sean) (Entered: 04/13/2005)
04/13/2005	37	NOTICE by Florida East Coast Railway Company *Notice to Court* (Mulhall, Sean) (Entered: 04/13/2005)
04/27/2005	38	STANDING ORDER - Filing of Documents that Exceed Twenty-Five Pages. Signed by all Jacksonville Judges on 04/27/05(jkl) (Entered: 05/05/2005)
05/06/2005		COPIES mailed to Counsel: Randall A. Jordan Unrepresented Parties: on behalf of Edward LeRoy Swindell re 38 Order (SJW,) (Entered: 05/06/2005)
05/13/2005	39	NOTICE by CSX Transportation Corporation *Notice to Court (Second)* (Mulhall, Sean) (Entered: 05/13/2005)
05/13/2005	40	NOTICE by Florida East Coast Railway Company *Notice to Court (Second)* (Mulhall, Sean) (Entered: 05/13/2005)
06/14/2005	41	NOTICE by CSX Transportation Corporation *Notice to Court (Third)* (Mulhall, Sean) (Entered: 06/14/2005)

Date Filed	#	Docket Text
06/14/2005	42	NOTICE by Florida East Coast Railway Company *Notice to Court (Third)* (Mulhall, Sean) (Entered: 06/14/2005)
07/27/2005	43	NOTICE by CSX Transportation Corporation *Notice to Court (Fourth)* (Mulhall, Sean) (Entered: 07/27/2005)
07/27/2005	44	NOTICE by Florida East Coast Railway Company *Notice to Court (Fourth)* (Mulhall, Sean) (Entered: 07/27/2005)
09/28/2005		ORDER granting 29 Motion for summary judgment, granting 31 Motion for summary
	45	judgment; dening $ and 13 Plaintiffs motions for summary judgment. The Clerk is directed to enter judgment for Defendants FEC and CSXT, terminate all other pending motions as moot and close the case . Signed by Judge Thomas E. Morris on 9/28/2005 (WB,) (Entered: 09/28/2005)
09/30/2005		COPIES mailed to Counsel: Randall A. Jordan Unrepresented Parties: on behalf of Edward LeRoy Swindell re 45 Order on motion for summary judgment (JLM,) (Entered: 09/30/2005)
09/30/2005	46	JUDGMENT in favor of FEC and CSXT Signed by Deputy Clerk on 9/30/2005. (JLM,) (Entered: 09/30/2005)
09/30/2005		COPIES mailed to Randall A. Jordan and Edward LeRoy Swindell re 46 Judgment (JLM,) (Entered: 09/30/2005)

Date Filed	#	Docket Text
09/30/2005		***CASE CLOSED. (JLM,) (Entered: 09/30/2005)
10/14/2005	47	EXHIBITS re 29 MOTION for summary judgment filed by CSX Transportation Corporation and 31 MOTION for summary judgment filed by Florida East Coast Railway Company (filed separately); UNSEALED per 45 Order. (Attachments: # 1 Continuation) (sms) (Entered: 10/14/2005)
10/14/2005	48	First MOTION for taxation of costs by CSX Transportation Corporation. (Attachments: # 1 Affidavit 28 USC 1920 Verification)(Mulhall, Sean) (Entered: 10/14/2005)
10/14/2005	49	First MOTION for taxation of costs by Florida East Coast Railway Company. (Attachments: # 1. Affidavit 28 USC 1920 Verification)(Mulhall, Sean) (Entered:10/14/2005)
10/17/2005		***Staff notes: Counsel to file Proposed Bill of Costs on court's form. (JLM,) (Entered:10/17/2005)
10/17/2005	50	NOTICE OF APPEAL as to 46 Judgment, 45 Order on motion for summary judgment, by Edward LeRoy Swindell (pro se). Filing fee not paid. (SEG) (Entered: 10/18/2005)
10/18/2005		TRANSMITTAL of initial appeal package to USCA consisting of certified copies of notice of appeal, docket sheet, order/judgment being appealed, and motion, if applicable to USCA re 50 Notice of appeal. Transcript information form sent. (SEG) (Entered:10/18/2005)

Date Filed	#	Docket Text
10/21/2005	51	BILL OF COSTS taxed against PI, Edward Leroy Swindell in the amount of $1,721.01. Signed by Deputy Clerk. (JLM,) (Entered: 10/21/2005)
10/21/2005	52	BILL OF COSTS taxed against PI, Edward Leroy Swindell in the amount of $1,894.00. Signed by Deputy Clerk. (JLM,) (Entered: 10/21/2005)
10/24/2005	53	***USCA case number 05-15731-D for 50 Notice of appeal filed by Edward LeRoy Swindell. (SEG) (Entered: 10/25/2005)
10/27/2005	54	TRANSCRIPT information form filed by Edward LeRoy Swindell re 50 Notice of appeal. USCA number: 05-15731-D. (SEG) (Entered:10/27/2005)
11/02/2005		USCA appeal fees received $ 255 receipt number J020923 re 50 Notice of appeal filed by Edward LeRoy Swindell, USCA notified, 05-15731-D. (SEG) (Entered: 11/03/2005)
11/21/2005	55	NOTICE of change of address by Edward LeRoy Swindell (JLM,) (Entered: 11/22/2005)
11/21/2005	56	MOTION to Defer Costs by Edward LeRoy Swindell. (JLM,) (Entered: 11/22/2005)
12/01/2005	57	RESPONSE in opposition re 56 MOTION Defer Costs filed by Florida East Coast Railway Company, CSX Transportation Corporation. (Mulhall, Sean) (Entered: 12/01/2005) .

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

EDWARD LEROY SWINDELL,

Plaintiff,

-vs- **Case No. 3:03-cv-435-J-TEM**

FLORIDA EAST COAST RAILWAY; CSX TRANSPORTATION CORPORATION,

Defendants.

_____/

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the COurt. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that pursuant to this court's order entered September 28, 2005, judgment is hereby entered for Defendants FEC and CSXT.

Date: September 30, 2005

SHERYL L. LOESCH, CLERK

___Janet McLemore___
By: Deputy Clerk

Copy to:

Counsel of Record
Unrepresented Parties

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

EDWARD LEROY SWINDELL,
And others of similar circumstances,

Plaintiff,

-vs- Case No. 3:03-cv-435-J-TEM

FLORIDA EAST COAST RAILWAY; LLC
and CSX TRANSPORTATION, INC,

Defendants.
_____/

ORDER

This cause is before the Court on several motions to dismiss and motions for summary judgment. Because there has been prior litigation between the Plaintiff and one of the Defendants, the Court will begin with a narrative summary of the background.

Plaintiff Edward Leroy Swindell ("Swindell") is a former employee of the Defendant Florida East Coast Railway Company ("FEC"), having worked for the FEC from 1939 until 1952 at various jobs on locomotives (Doc. # 1, paragraph 3). In 1996, Swindell filed a complaint in state court in Dade County, Florida, against FEC[1] alleging negligent acts of the railroad caused him to be exposed to "toxic substances including asbestos, asbestos containing products, and diesel exhaust fumes which caused him to suffer permanent injuries to his lungs." (See Doc. # 10, Attachment A) That action later was voluntarily dismissed by Swindell's attorney (See Doc. # 10, paragraph 5).

[1] *Edward Leroy Swindell and Mary Young Swindell v. Florida East Coast Railway Company*, Case No. 96011352, Circuit Court of the 11 th Judicial Circuit. This case will be referred as the Swindell 1996 case.

Swindell subsequently filed another suit against FEC in the Southern Distict of New York, again alleging exposure to harmful substances while employed. That case was dismissed by the court based on lack of proper jurisdiction. Swindell v. Florida East Coast Ry. Co., 42 F.Supp.2d 320 (S.D.N.Y.), *aff'd*, 201 F.3d 432 (2d Cir. 1999) (table).

Swindell filed suit for a third time against the FEC in this court in 2000, again alleging exposure to harmful substances causing permanent injury to his "lungs and pleura".[2]Summary judgment was granted in favor of FEC based upon the statute of limitations (Case No. 3:00-cv-224-J-21TJC, Doc. # 38). The Eleventh Circuit affirmed the summary judgment in an unpublished opinion, 31 Fed Appx. 935 (11th Cir. 2002), cert. denied, 537 U.S. 820 (2002).

Swindell filed the instant case on May 23, 2003 (Doc. #1), naming both FEC and CSX Transportation Corp. ("CSX") as defendants, and claiming he is seeking damages for chronic obstructive pulmonary disease ("COPD") or emphysema (Doc. #1, paragraph 7).

Motions Pending:

CSX filed a motion to dismiss on the ground that Swindell had never been an employee of CSX (Doc. #7). Swindell replied that under the "joint enterprise doctrine" CSX could be jointly liable with FEC and included a motion for summary judgment (Doc. #8). FEC filed a motion to dismiss based on *res judicata* and argued a the "second injury doctrine" would not apply to Swindell's claim (Doc. # 10). Swindell replied and included a motion for summary judgment (Doc. #13). The Court[3] converted the motions to dismiss into motions for summary judgment and deferred ruling on Swindell's motions for summary judgment, allowing the parties a 60-day period to conduct any discovery as to the medical issues and to file any additional pleadings (Doc. # 24).

CSX subsequently filed a motion for summary judgment (Doc. # 29). FEC also filed a motion for summary judgment (Doc. # 31). Each

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[2]*Swindell V. FEC*, Case No. 3:00-cv-224-J-21TJC. Chis Case will be referred to as the "2000 case"

[3]The parties consented to jurisdiction of a United States Magistrate Judge(Doc.#18).

defendant filed motions to seal exhibits (Does. # 30, #33) which were granted (Doc. # 34)(the exhibits are identical and filed as S-1) and jointly filed an affidavit of Dr. Philip Richard Saleeby (Doc. # 32). Swindell filed a reply to FEC's motion (Doc. # 35).

Summary of the Issues:

1. Plaintiff asserts the injuries he now alleges are "second injuries" unknown to him until 2002, and thus his claim is not barred by the statute of limitations or the doctrine of res judicata. He further alleges CSX is liable along with former employer FEC under the "joint enterprise doctrine."

2. FEC claims (a) the doctrine of res judicata does apply and bars relitigation of the 2000 lawsuit, (b) that Swindell's present claim does not qualify under the "second injury doctrine" and (c) that the statute of limitations applicable to the case is three years under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. Section 56 et seq.

3. CSX claims (a) the FELA three-year statute of limitations applies and bars Swindell's claim and (b) that Swindell was never employed by CSX and does not qualify for the "joint enterprise doctrine."

Analysis:

1. **Standards for motion to dismiss and summary judgment**

To prevail on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant must show beyond all doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957); *Luckey v. Harris*, 860 F.2d 1012, 1016 (11th Cir. 1988). Courts disfavor motions to dismiss and grant such motions only in rare circumstances. *See Gasper v. La. Stadium and Exposition Dist.*, 577 F.2d 897, 900 (5th Cir. 1978).[4] Further, the court must accept a plaintiffs pleaded facts as true, and all inferences are to be construed in the light most favorable to the plaintiff.

[4] In *Bonner v. City of Pritchard*, 661 F. 2d 1206, 1209 (11th Cir. 1981) (*en banc*) the Eleventh Circuit adopted as binding precedent all the decisions of the former fifth Circuit handed down prior to the close of business on September 30, 1981

See, e.g., Bryand v. Avado Brands, Inc., 187 F.3d 1271, 1274 n. 1 11th Cir.1999 .

If extraneous material is presented to the court in the motion to dismiss, under Rule 12(b) the "motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 ...." See, e.g., Campbell v. Upjohn Co., 498 F.Supp. 722, 729 (W.D. Mich. 1980), aff'd, 676 F.2d 1122 (6th Cir.1982)(involving a statute of limitations issue). "Whenever a judge considers matters outside the pleadings in a Rule 12(b)(6) motion that motion is thereby converted into a Rule 56 Summary Judgment motion." *Trustmark Ins. Co. v. ESLU, Inc.*, 299 F.3d 1265, 1267 (11th Cir. 2002). Based on the facts stated in the motions to dismiss, the Court converted the motions to dismiss into motions for summary judgment in its earlier Order (Doc. # 24). The parties were allowed appropriate time to supplement the record.

Summary judgment is appropriate only when a court is satisfied that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The evidence must be viewed in the light most favorable to the non-moving party. *See Samples on Behalf of Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). The burden of establishing the absence of a genuine issue is on the moving party. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Once the burden is met, the non-moving party must "go beyond the pleadings and by his/her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, supra, 477 U.S. at 324. To do so, the plaintiff need only present evidence from which a jury might return a verdict in his favor to defeat a summary judgment motion. Samples, supra, 846 F.2d at 1330.

2. **Applicable federal statutes**

In order to determine the statute of limitations period, the Court first must determine the applicable statute. The late Honorable Judge Ralph W. Nimmons Jr. ruled in the 2000 case that the three-year statute of limitations in FELA, 45 U.S.C. § 56, applied (2000 case, Doc. # 38). That opinion was affirmed by the Eleventh Circuit. 31 Fed. Appx.

935 (per curiam unpublished opinion attached as Attachment A)[5]. In the 2000 case, Swindell alleged jurisdiction under the Safety Appliance Act ('SAA"), 45 U.S.C. §§ 1-16; the Boiler Inspection Act ("BIA"), 45 U.S.C. §§ 22-34 et seq., and FELA, 45 U.S.C. § 51 et seq. The Eleventh Circuit held that neither the BIA nor the SAA provide for a private right of action because the acts merely supplement FELA (*Swindell v. FEC*, see Attachment A at 7). *Also see Urie v. Thompson*, 337 U.S. 163, 188 (1949). Thus any actions brought under the BIA or SAA are subject to the FELA three-year statutory limitations period. Id. at 168; *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574, 580-581 (1945).

In the instant case Swindell has alleged jurisdiction based on the "Code of Federal Regulations" ("CFR"), the BIA, the SAA, and the Interstate Commerce Commission ("ICC") rules and regulations (Doc. # 1, paragraph 4). He has not alleged any particular sections, however. Since regulations are based upon statutory authority, they cannot extend any statute of limitations created by Congress.

Because Swindell has specified the BIA and SAA, to the extent either of those statutes provided jurisdiction the action would be subject to the three-year statute of limitations contained in FELA. Swindell v. FEC (Attachment A at 7). However, the Eleventh Circuit stated based upon Supreme Court precedent that those two statutes do not provide a private right of action. The acts make certain actions unlawful, but provide for enforcement by either the Secretary of Transportation (for the Safety Appliance Act, Title 45 U.S.C. X13) or the United States Attorneys Office (for the Boiler Inspection Act, 45 U.S.C. § 34).

Swindell, for reasons not stated, has indicated specifically that he is not using FELA as a basis for jurisdiction (Docs. # 8, paragraph 1, #13, paragraph 2)[6]. Courts typically give a liberal reading to pro se complaints. Because the Boiler Act and Safety Appliance Act

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[5]U.S.Ct. Of App. 11th Cir. Rule 36-2, 28 U.S.C.A.

[6] Swindell may be attempting to not claim FELA because FELA's three-year statute of limitations is clearly established. Plaintiff also may be seeking to avoid the necessity of proving negligence, as the Supreme Court has held the Boiler Inspection

(continued,..)

supplement FELA (*see Urie v. Thompson*, 337 U.S. at 188) the Court will treat the complaint as asserting federal jurisdiction under FELA. Should Plaintiff object to this treatment, there would be no jurisdictional basis for a federal case and the instant action would be dismissed on that basis. Both Defendants have stated Plaintiff filed the suit under FELA. See Doc. 29, paragraph 1 and Doc. 31, paragraph 1.

Thus the Court finds a three-year statute of limitation is applicable in the case. Since the complaint was filed May 23, 2003, the question - for statute of limitations purposes - is whether Plaintiffs cause of action occurred since May 23, 2000.

3. **Statute of Limitations**

Statutes of limitation are legislative creations designed to give what the legislature deems a reasonable time for a plaintiff to present his or her claim. United States v. Kubrick, 444 U.S. 111, 117 (1979). At the same time, they protect defendants and the courts from "having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *Id.*

In the case of allegations of work-related injuries, the Supreme Court has held that the limitations period commences when the plaintiff knew or should have known that his injuries were work-related. Kubrick, supra, 444 U.S. at 125; Urie v. Thompson, 337 U.S. at 168-171(1949). See also Santiago v. Lykes Bros. S. S. Co., Inc., 986 F.2d 423, 426 (11th Cir. 1993).

4. **Analysis as to claim against FEC**

There is no dispute that Plaintiff has made previous claims against Defendant FEC. Thus the issue before the Court as to the current claim against FEC is whether it is barred by res judicata and/or the statute of limitations. Plaintiff can prevail only if his current claim is one not decided previously by the Court and if the claim arose from an injury realized only within three years prior to the filing of the suit on May 23, 2003.

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[6](...continued)

Act and Safety Application Acts amend FELA and dispense the requirement of proving violations of the acts are negligent. Urie v. Thompson, 337 U.S. at 189. Plaintiff noted he did not have to show negligence u.nder the two statutes in his reply (Doc. #13, paragraph 2) to FEC's Motion to Dismiss.

Plaintiff alleges his claim is of a second injury of which he was unaware prior to its diagnosis - "chronic obstructive pulmonary disease (COPD) or emphysema" - at an examination on October 2, 2002.Plaintiff is correct that a statute of limitations may begin at the time a separate and distinct illness accrues. The question becomes whether the alleged illness is a separate and distinct illness. An example of such illness in FELA cases is the development of mesothelioma, a cancer which causes fatality in perhaps 10 per cent of the persons who have contracted asbestosis. Norfolk & Western Ry. Co. v. Ayers, 538 U.S. 135, 142 (2003).

Plaintiff asserts "An injured party is not required to foresee whatever disease might ensue in the future." (Doc. # 1 at 5). Although that may be true, it does not resolve whether Plaintiff's current complaint is of a separate and distinct illness. In adopting the "discovery" theory of when a cause of action "accrues" the Supreme Court rejected the "actual occurrence" theory because of the difficulty in determining such event. Urie, supra, at 171. The Court also rejected the "damage caused in the last three years" theory because it would limit damages to "breath by breath" measurement. Id. Thus, the primary question before the Court is when Plaintiff knew or should have known that his injuries were work related.

Plaintiff now claims in his complaint that his "chronic obstructive pulmonary disease or emphysema" was diagnosed after an examination on October 2, 2002 (Doc. # 1, paragraph 7). In the 1996 suit in state court Plaintiff claimed that his railroad work "exposed him to toxic substances including asbestos, asbestos containing products, and diesel exhaust fumes" and "caused him to suffer permanent injuries to his lungs" (1996 complaint, paragraph 7). In the 2000 federal complaint in this district, Plaintiff claimed he had suffered "permanent injuries to his lungs and pleura" and "respiratory illness, Asbestosis (sic) and obstructive pulmonary disease requiring professional treatment, care and continued medication" as well as emotional distress. He further claimed he had spent $27,525 for treatment. (2000 complaint, pp. 1, 5 and 7).

For purposes of this Order, the Court will refer to medical records contained in a sealed document (Doc. # 33, sealed exhibits A-L) and order unsealed only the portions to which the Court refers and to which

the parties referred in their motions for summary judgment. The Court finds no reason to unseal the entire document, which contains personal identifiers as well as records of treatment for other conditions not in dispute in the case.

The medical records show that on January 15, 1998, the Plaintiff was examined by Dr. Bernard R. Schrager, a cardiologist in Miami, Florida. Dr. Schrager testified at a deposition that Plaintiff was referred to him for examination by Dr. Dennis Korpman of the Ocean Reef Medical Center in North Key Largo, Fl. (Doc. #33, Exh. F at 15). In providing the results of the January 1998 examination, Dr. Schrager wrote that "As you know, he is a 75-year-old gentleman with a history of atypical chest pain, shortness of breath and chronic obstructive pulmonary disease." (Doc. #33, Exh. B) Dr. Schrager said he had made similar notes of asbestosis and COPD after visits on December 21, 1998 (Doc. #33, Exh. C), May 6, 1999 (Doc. #33, Exh. D), December 3, 2001 (Doc. #33, Exh. E). Dr. Schrager testified that his practice is to obtain the medical history from the patient rather than from the referring physician (Doc. #33, Exh. F at 7).

The medical records show an emergency room visit on March 12, 1996, which the clinical impression was listed as "COPD/ pneumonia/ atrial fib." (Doc. #33, Exh. G). Dr. Korpman's notes of December 18, 1998, also contain a reference to "mild COPD by hx"[7] (Doc. #33, Exh. I). Three days later, a radiologist took a chest x-ray and listed a diagnosis of COPD (doc. #33, Exh. J). In December 20, 1999, Dr. Korpman's notes show a past medical history of COPD and Asbestosis. Further, the medical notes of Dr. Korpman for April 24, 2000, state that the Plaintiff wants "renewal of his Atrovent for COPD." (Doc. #33, Exh. H).

In addition, FEC has produced an affidavit that emphysema is a chronic obstructive, pulmonary disease. (See affidavit of Dr. Phillip Saleeby, M.D., Doc. # 32, attachment, paragraph 6). In Samson v. R.J. Reynolds Tobacco Co., No. 96-414-CIV-T-24(B),1997 WL 373475 (M.D.Fla. June 2, 1997), the court found emphysema was a COPD.

[7] "Hx" is a typical abbreviation used by medical professional to denote the word history.

Plaintiff, although he now claims he has a "newly diagnosed COPD"[8], nonetheless claimed "permanent injuries to his lungs" and continuing disability in both 1996 and 2000, and "obstructive pulmonary disease" which he would "continue to incur" in his pro se February 29, 2000, federal complaint. The Court sees no distinction between continuing injury and chronic injury. Thus, two regular treating physicians, one emergency room physician and one radiologist all diagnosed Plaintiff with "COPD" between 1998 and the end of April 2000. At least one of the treating physicians provided a prescription and renewal for Atrovent to treat the condition prior to the three-year statute of limitations period. Those diagnoses are conclusive on the question of whether the condition Plaintiff now alleges is a separate and distinct illness.

Whether Plaintiff was specifically told of the diagnosis at the time is not the significant factor. He was clearly aware of believed lung injury, aware of symptoms and getting treatment for such injury for several years prior to the expiration of the statute of limitations period. As noted in the District Court opinion in 2001, the statute of limitations commences when the injury is noticed and before it reaches maximum severity, not when it is later diagnosed. Swindell 2000 case, supra, at 14, citing Fries v. Chicago & Northwestern Trans. Co. 909 F.2d 1092, 1095 (7th Cir.1990). The Supreme Court held in United States v. Kubrick, 444 U.S. 111 (1979), that a plaintiff must ,act diligently to investigate the injury and any suspect cause.

In one sense, Plaintiff's claim is similar to that claimed by the plaintiff in White v. Mercury Marine, Division of Brunswick, Inc., 129 F.3d 1428, 1433 (11th Cir.1997). In that case the plaintiff had hearing loss caused by engine noise from the boat he operated. A doctor first advised him that the noise was causing hearing loss in 1984. Another doctor gave similar advice in 1988. In 1990, he filed a worker's compensation claim for hearing loss. He did not file suit against the engine manufacturer until 1994. Facing a three-year statute of limitations, he argued that a "modified continuing tort theory" should

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[8]The document presented to show this (Doc. # 35, Exhibit 3) is unidentified as it appears to be page 3 of a doctor's report, and is not sworn, thus is not properly before the Court on a summary judgment motion.

be used which would allow him to recover for the part of the injury that occurred within the last three years prior to filing suit. The Eleventh Circuit has held that a "modified continuing tort theory" is essentially the same as the "breath by breath" theory that was rejected by the Supreme Court in Urie. Mercury Marine, supra, 129 F.3d at 1433. The court further said the discovery rule must be applied uniformly. In some cases, the rule helps plaintiffs who are unaware of an injury. The rule simply requires plaintiffs who have discovered their injury to file suit within the prescribed period. Id. See also Albert v. Maine Cent. R. Co., 905 F.2d 541 (1st Cir. 1990).

Although Swindell might benefit from a "modified continuing tort theory," that theory is not the law in FELA cases. Swindell has shown no basis for treating COPD as a different and distinct illness from those he has claimed previously. Further, to the extent he claims it, the medical records belie his claim. He previously claimed he had spent $27,525 on treatment. His own previous complaints show he knew the cause of his pulmonary condition and that he believed it was because of his railroad work. The Court does not find that Plaintiff's alleged ailments are "second injuries" or "second diseases" that would trigger a new statute of limitations. Plaintiff is bound by his admissions in the 2000 complaint of obstructive pulmonary disease, confirmed by the medical records that show doctors were treating that condition. Plaintiffs claim that another doctor first told of the diagnosis in 2002 is not sufficient to show there is a genuine issue for trial.

Since the injury is the same - in effect - as alleged in 2000, the doctrine of *res judicata* applies as to Defendant FEC. "Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in that action." Allen v. McCurry, 449 U.S. 90, 94 (1980). The Eleventh Circuit has defined a four-step analysis to determine if res judicata will bar a subsequent action. Davila v. Delta Air Lines, 326 F.3d 1183, 1187 (11th Cir. 2003), citing Jang v. United Techs. Corp., 206 F.3d 1147, 1149 (11th Cir. 2000). Applying those steps,

(1) the prior decision was rendered by a court of competent jurisdiction. Title 28, U.S.C. Section 1331, provides original jurisdiction for all civil actions arising under the laws of the United States. The 2001 decision by Judge Nimmons qualifies.

(2) there was a final judgment on the merits. Rule 41(b), Fed.R.Civ. P., provides that unless otherwise specified by the court, "a dismissal under this subdivision and any dismissal not provided for in this rule .... operates as a adjudication upon the merits." Pursuant to Judge Nimmons' Order, the Clerk of Court issued a judgment for FEC. A ruling based on the statute of limitations is a judgment on the merits. Mathis v. Laird, 457 F.2d 926, 927 (5th Cir. 1972).

(3) the parties were the same in both suits. In both suits, Plaintiff Edward Leroy Swindell sued Defendant Florida East Coast Railway Company. In this suit, he also sued CSX Transportation, Inc., however, res judicata is not being applied to the suit against CSX.

(4) the prior and present causes of action are the same. Both suits are based on injury to his lungs that Plaintiff allegedly received while working for FEC from 1939 to 1952 through inhalation of various fumes and debris and handling of toxic substances. Both suits relate to pulmonary disease. Although Plaintiff has worded the injuries slightly differently, as found above both actions relate to the same injury.

Thus, res judicata applies and Defendant FEC is entitled to summary judgment on that basis. In addition, FEC also is entitled to summary judgment on the basis that the statute of limitations has expired.

5. **Claim against CSX Transportation**

There was no prior suit against CSX Transportation, thus res judicata does not apply. However, the statute of limitations analysis does apply in this case. Regardless of which company allegedly caused the injury of which Plaintiff complains, he has known of the injury and the resulting illness for more than three years before he filed the instant lawsuit. Thus the statute of limitations expired prior to his filing of the lawsuit. CSX is entitled to summary judgment on that basis.

CSX also argues that Plaintiff was not an employee of CSX or its predecessor Atlantic Coast Line, and that Plaintiff has not shown an employee relationship required to be able to sue under FELA.

Neither side disputes that FELA creates liability for negligently causing injury or death to a person "while he is employed" by the railroad. 45 U.S.C. § 51. The Supreme Court has indicated there are three ways under common law that a person can establish his "employment" or a master-servant relationship even though nominally

employed by another. Kelley v. Southern Pac. Co., 419 U.S. 318, 324 (1974). First, he could be a borrowed servant at the time of his injury. Second, he could be deemed to be acting for two masters simultaneously. Third, he could be a subservant of a company that was in turn a servant of the railroad. *Id.*

Swindell claims the two railroads operated service between Miami and Washington, D.C., on a joint basis and that he traveled on and repaired locomotives for both railroads, and was supervised by engineers and conductors of whichever company owned the locomotives he was on at the time. He attached to his response (and motion for summary judgment) a copy of a photograph which appears to show a crew of seven persons standing or leaning against an ACL locomotive in 1943.

CSXT denies that Plaintiffs allegations show sufficient connection to ACL to qualify as an "employee" under any of the three categories detailed in Kelley.

Neither side has presented sworn affidavits or documents further enlightening the historical facts. In view of the lack of sworn presentation, the Court cannot find there is no genuine issue of fact on the question. However, in view of the Court's finding on the statute of limitation issue, there is no need for the Court to rule on the employment issue.

Conclusion

Upon consideration of the foregoing, it is hereby **ORDERED:**

1. FEC's Motion for Summary Judgment (Doc. # 31) is **GRANTED.**

2. CSXT's Motion for Summary Judgment (Doc. # 29) is **GRANTED.**

3. Plaintiffs Motions for Summary Judgment (Doc. #8, and #13) are **DENIED.**

4. The Clerk is **DIRECTED** to enter judgment for Defendants FEC and CSXT.

terminate all other pending motions as **MOOT** and close the case.

DONE AND ORDERED, at Jacksonville, Florida, this 28th day of September, 2005.

THOMAS E. MORRIS
THOMAS E. MORRIS
United States Magistrate Judge

Copies to:
All counsel of record
Pro Se Plaintiff

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

EDWARD LEROY SWINDELL,
and others of Similar circumstances,

Plaintiff,

-vs- CASE NO. 3:03-CV-435-J-25 HTS

FLORIDA EAST COAST RAILWAY; LLC.
and CSX TRANSPORTATION INC.

Defendants.
_____/

DEFENDANT, CSX TRANSPORTATION, INC.'s
MOTION TO DISMISS AND MEMORANDUM OF LAW

Defendant, CSX Transportation, Inc. ("CSXT"), by and through its undersigned counsel, pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure and Local Rule 3.01, files this Motion to Dismiss Plaintiff's Complaint based upon the following grounds:

1 . Plaintiff filed suit under the Federal Employers' Liability Act, 45 U.S.C. §51 et seq., the Locomotive Inspection Act ("LIA"), 49 U.S.C. §20701 et seq. and the Federal Safety Appliance Act ("FSAA"), 49 U.S.C. §20301, et seq. alleging that he suffered asbestos-related disease as the result of occupational exposure to asbestos containing products.

2. Plaintiff alleged that he was exposed to asbestos containing products while employed by the Florida East Coast Railway from 1939 to 1952.

3. Plaintiff does not allege that he was an employee of CSXT at any time.

4. Under the FELA, LIA and FSAA, a lawsuit may only be brought by an individual who was injured while employed by the railroad.

5. Plaintiff has failed to state a claim upon which relief may be granted.

6. Additionally, Plaintiff has demanded punitive damages in his complaint which are not recoverable under the FELA, LIA or FSAA.

MEMORANDUM OF LAW

1. Plaintiff was not an employee of CSXT

The FELA, was enacted to provide a remedy for on the job injuries to an employee of a railroad carrier. The statute specifically states that the employee's redress is against the railroad carrier that they are employed by when the alleged injury occurs. The first section of the FELA makes this point abundantly clear:

> Every common carrier by railroad, while engaging in commerce....shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce...

45 U.S.C. 51 (1939).

Furthermore, the LIA and SAA do not provide independent causes of actions and remedies separate from the FELA. These statutes only provide certain standards under the FELA.

In its Order granting Defendant's Motion for Summary Judgment in Edward Leroy Swindell, v. Florida East Coast Railway Co., 3:00-cv-224-J-2ITJC (M.D. Fla. 2001), aff'd, 31 Fed. Appx. 935 (11th Cir. 2002), reh. dens, 33 Fed. Appx. 996 (11th Cir. 2002) , This Court ruled that:

> "[t]he FELA permits railroad workers to recover for injuries caused by the negligence of their employers or fellow employees." Matson v. Burlington N. Santa Fe R.R., 240 F.3d 1233 (10th Cir. 2001), citing Feichko v. Denver & Rio Grande W. R. Co., 213 F.3d 586, 591-592 (10th Cir. 2000). Neither the LIA, nor the Safety Appliance Act are independent sources of redress; rather, these acts articulate standards, the violation of which is actionable per se under FELA. Urie, v., Thompson, 337 U.S. 163, 168, 168-171, 188-189 & n.30, 69 S.Ct. 1018, 1033-1034 & no. 30, 93 L.Ed. 1282 (1949);

O'Loughlin v. Nat'l R.R. Passenger Corp., 928 F.2d 24, 26 n. 3 (1st Cir. 1991).

(Order, pg. 9, Attached as Exhibit A).

2. Punitive Damages are not recoverable

The damages available under the FELA are limited to compensation for pecuniary loss only. Michigan Central Railroad Co. v. Vreeland,, 227 U.S. 59, 33 S.Ct,192, 57 L.Ed. 417 (1913). "It has long been held that punitive damages are not available under FELA." Matter of Mardoc Asbestos Cpe Clusters,' ,2,5, & 6,, 768 F.Supp. 595 (ED. Mich. 1991); Wildman v. Burlington Northern Railroad Co., 825 F.2d 1392 (9th Cir. 1987). In fact, "there is not a single case since the enactment of FELA in 1908 in which punitive damages have been allowed". Toscano v. Burlington Northern Railroad Co., 678 F.Supp. 1477, 1479 (D. Mont. 1987).

WHEREFORE, Defendant respectfully requests that This Court enter an Order dismissing Plaintiff s Complaint for failure to state a claim upon which relief can be granted.

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D'ANDREA, CHAREK & MILTON, P.A.

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document has been furnished to Edward L. Swindell, P.O. Box 36, Millbrook, New York, 12545 by U.S. Mail this 19th day of June, 2003.

Sean L. Mulhall
attorney

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

_____x

Edward LeRoy Swindell, PRO SE, and
Others of Similar Circumstances, Plaintiffs,

COMPLAINT

-against

JURY TRIAL DEMANDED

Florida East Coast Railway Company
and
CSX Transportation Corporation, **3.03-CV-435-J-25HTS**
Defendants

_____x

The Plaintiff, Edward LeRoy Swindell, residing at P.O. Box 36, Trotwood Farm, Tower Hill Road, Millbrook, New York 12545, and others of similar circumstances to be specified later, sue the Defendants, Florida East Coast Railway Company (FEC), headquartered at 1 Malaga Street, St. Augustine, Florida 32084-3580, and the CSX Transportation Corporation (CSX), 500 Water Street, Jacksonville FL 32202, successor to Atlantic Coastline Railroad (ACL) and state as follows:

1. At all times material hereto, the defendants were and are railroad companies which own and operate railroads on the East coast of Florida between Jacksonville and Miami and/or the States of Georgia, South Carolina, North Carolina and Virginia.

2. Defendants were at all times relevant hereto engaged in interstate commerce between the States of the United States as common carriers by rail, and for that purpose, Defendants did operate in interstate commerce locomotives and railroad cars and repaired and maintained same and transacted substantial business in and about the East coast of the State of Florida and the above mentioned states outside the State of Florida and jointly furnished locomotives on a joint venture on interconnecting trains between Miami and Washington, D.C.

3. Beginning in the year 1939, Plaintiff commenced employment with the Defendant FEC as a laborer in the Locomotive Shop at Millers Shop at St. Augustine, Florida. During his employment, which ended in 1952, Plaintiff was advanced to apprentice Electrician, Electrician and Diesel Locomotive Attendant working at repair shops in St. Augustine, Florida, at New Smyrna, Florida, and Miami, Florida and on FEC and ACL locomotives journeying between Jacksonville, Florida, and Miami, Florida. It was during this period of employment on the "locomotives in use" operating in interstate commerce and at the locations mentioned, that Plaintiff suffered the permanent injuries more specifically set forth below. All or substantially all of Plaintiff's duties were in furtherance of and did closely, directly and substantially affect and were engaged in interstate commerce.

4. Wherefore, all rights and liabilities were and are governed by and under the following acts, laws, rules and regulations of the United States:

Code of Federal Regulation (CFR)
Boiler Inspection Act, 45 USC Sec. 22-34 et seq. (BIA)
Safety Appliance Act , 45 USC Sec. 1-16 et seq. (SAA)
Interstate Commerce Commission (ICC) Rules and Regulations

5. The bases for jurisdiction are violations of the aforementioned federal acts, code, rules, regulations and laws.

Causes of Action

6. The Plaintiff commenced an action against Defendant FEC on June 7, 1996, in the State Court in Dade County, Florida, to recover damages for contracting asbestosis. The suit was later terminated prior to trial without prejudice by mutual consent of the two parties. Subsequently Plaintiff commenced an action in the District Court, 2nd Circuit, in White Plains, New York to recover damages for contracting asbestosis and resultant emotional distress due to fear of contracting cancer of the lungs. Following a decision in that Court that venue was improper, the Plaintiff, at the suggestion of the Judge in the 2nd District Court, commenced an action in the District Court, 11th Circuit, in

Jacksonville, Florida, to recover for damage from asbestosis and emotional distress. Prior to trial, the District Judge ruled by summary judgment that Plaintiff had exceeded the statute of limitations by one month. This judgment was upheld by the Court of Appeals of the Eleventh Circuit. Plaintiff then filed a petition for certiorari to the United States Supreme Court on May 29, 2002, which was denied on October 7, 2002. A petition for rehearing was filed on October 29, 2002, and was denied after being distributed for Conference of February 21, 2003. It should be pointed out that the Plaintiff has never had a trial on the merits.

7. The action brought herein is based on the "second injury" doctrine specifically related to asbestos cases and espoused in Sopha v. Owens Corning Fiberglass Corp., 230 SW2d 212, 601 NW2d 627 (Wisc. 1999), and supported by cases in the majority of jurisdictions throughout the country such as: Petzer v. Board of Regents, 763 F.2d 851 (7th Cir.1985); and Potts v. Celotex Corp., 796 S.W. 2d 678 (Tenn. 1990). Although the tortuous acts of the Defendants occurred many years ago, the cause of action for which Plaintiff seeks relief herein is the onset of chronic obstructive pulmonary disease (COPD) or emphysema which was diagnosed following an examination on October 2, 2002. This is a discrete and disparate injury unsuspected by the Plaintiff prior to this diagnosis. The Plaintiff has a right to receive a trial on the merits and a second suit is not barred by res judicata when there has been no decision on the merits in a prior suit. Petzer v. Board of Regents, 763 F.2d 851 (7th Cu. 1985). In a recent decision by the United States Supreme Court, Norfolk & Western R. Co. v. Avers et al., (01-963 U.S. Supreme Court, March 10, 2003), it was made clear that second injuries in cases involving asbestos derived injuries can stand alone and compensation for injuries is recoverable upon occurrence. An injured party is not required to foresee whatever disease might ensue in the future.

8. Beginning in 1939 and ending in 1952, Plaintiff was employed by Defendant FEC. In the scope and course of his employment with Defendant he was required and caused to work on an ongoing basis in the vicinity of, be exposed to and ordered by the Defendant to handle and forced to breathe toxic carcinogenic substances, handle asbestos products and materials, and also was exposed to diesel exhaust fumes and debris, all of which caused him to suffer permanent injuries to his

lungs. As a result of the actions of the Defendants constituting both negligence and negligence *per se*, defendant contracted asbestosis, as diagnosed in 1994.

Plaintiff was assigned and worked at first as a laborer removing, grinding up and reinstalling asbestos lagging on steam locomotives in the coach and locomotive shops at locations owned and operated by Defendant FEC in St. Augustine, New Smyrna and Miami, and later as an electrician in the same shops. Later he worked as a traveling diesel locomotive attendant on "line-of-road" in interstate commerce working on FEC and ACL locomotives "in use" between Miami and Jacksonville.

As a laborer in the locomotive overhaul shops at Miller's Shops, Plaintiff was required to remove, grind-up and reinstall the asbestos lagging on the steam locomotives in compliance with Interstate Commerce Commison's (I.C.C.) rules and regulations. Stripping of the locomotives' boilers of asbestos caused enormous amounts of dust and debris containing loose asbestos fibers which permeated the air of the premises at all times during locomotive overhaul. Plaintiff, along with others working in the same situation, while handling the asbestos lagging with no protective gear available was exposed on an ongoing basis to the carcinogenic fiber and asbestos debris permeating the atmosphere during his total employment at Miller's Shops with Defendant FEC.

9. Plaintiff was also required to perform the duties of a traveling diesel locomotive attendant on locomotives "in use" on line-of-road that traveled to or were received from the ACL railroad from Washington, D.C. and were owned and operated by Defendants FEC and ACL. This required prolonged confinement in an enclosed area without proper ventilation and a continual exposure to carbon monoxide, nitrate oxide and carbon dust and diesel fumes blown back into the locomotive from the boiler on the diesel locomotives due to defective blow-off cocks on these locomotives' steam boilers, when the boilers were blown-down by the Plaintiff. Failure to correct the defective cocks was in specific violation of provisions of the BAA, the SAA ,and I.C.C. regulations, *supra*. When it was necessary for the Plaintiff and others to connect or disconnect a locomotive "in use" from the rest of the train on line-of-road, there was always a blow back of carbon and dust from the insulated covered main steam pipes at the flexible connection

located at the automatic coupler that connects the locomotive to the first passenger car, which is a violation of the (CFR), (SAA), *supra*, and I.C.C. rules and regulations.

10. The nature and extent of injuries received and the resultant physical effects and impact have only come to full recent awareness of the Plaintiff when he was diagnosed an October 3, 2002, with obstructive pulmonary disease (COPD) or emphysema.

11. The Plaintiff declares and avows that the Defendants, by and through their authorized agents, servants and employees were negligent *per se* and guilty of one or more of the following negligent acts or omissions in violation of common law and the laws and acts cited above:

a. Negligently failed to provide Plaintiff and others with a reasonably safe place in which to work;

b. Negligently failed to provide Plaintiff and others with safe equipment, including adequate protective mask and/or respiratory protection devices, and tools with which to work;

c. Negligently failed to warn the Plaintiff and others of the toxic hazardous, and carcinogenic nature of asbestos fibers and/or diesel fumes present on or about locomotives "in use" on which they were required to work on line of road or in the repair and overhaul shops and facilities in which they were required to work;

d. Negligently failed to instruct or train Plaintiff and others while they were working as a laborer, or during the period of apprenticeship training or subsequently in any form of proper or safe handling of materials which were highly toxic or carcinogenic in violation of the common law duty of master to servant.

e. Negligently and negligently *per se*, failed to provide Plaintiff and others with safe and proper ventilation in the work place, including repair shops and locomotives on line-of-road;

f. Negligently failed to take measures to reduce Plaintiff's and others' risk of forced exposure to asbestos, dust or fibers and/or diesel fumes on line-of-road or in the shops;

g. Negligently failed to inspect or adequately repair locomotives in use, cars, cabooses, appurtenances and other equipment and buildings on and within which Plaintiff and others worked in order to determine the extent 4 and protect them from, contamination by asbestos, dust,

fibers and/or diesel fumes; and refused to correct the defects or equipment failures after Plaintiff had reported same at the end of the run;

h. Willfully and negligently failed to correct conditions or faulty equipment when brought to Defendants' attention by the Plaintiff and/ or others or through the company's local Safety Committee reports;

i. Negligently ignored public studies and reports regarding the dangers inherent in asbestos and/or diesel fumes;

j. Failed to diligently pursue the standards required under common law of a master entrusting tools, implements or tasks to his servant, including the duty to be knowledgeable of the nature of the material he places in the hands of the servant with which to work and the duty to warn the servant of any dangers latent or patent, and;

k. Negligently failed to direct its well staffed hospital or its on-site-clinic physicians to monitor or conduct test or evaluation of air sampling or refer to said staff reports submitted by the Safety Committee and failed to educate itself or its medical staff with medical, technical or other information supplied by the American Railroad Association, Labor Organization or other applicable railroad professional institutions.

1. Failed to provide periodic physical examinations of Diesel Locomotive Attendants working on line-of-road as were performed on Locomotive Engineers and Firemen so engaged. This failure was both negligent and discriminatory.

12. One or more of the foregoing negligent acts or omissions directly and proximately caused Plaintiff to develop and suffer from Emphysema, an obstructive pulmonary disease requiring professional treatment, care and continued medication.

13. As a result of Plaintiff s respiratory illness, proximately caused by Defendants' negligence and negligence *per se*, Plaintiff has suffered and will continue to suffer great pain and disability caused by or aggravated by dust, asbestos particles and/or diesel fumes absorbed during his employment by Defendant FEC and working on equipment owned and operated by Defendant ACL. Plaintiff has incurred, and will continue to incur, great expense in endeavoring to be cured, monitored and treated for physical diseases arising from his employment with the Defendants.

WHEREFORE, EDWARD LEROY SWINDELL, Plaintiff, prays and demands that judgment be entered in his favor against the FLORIDA EAST COAST RAILWAY COMPANY, Defendant, and the CSX TRANSPORTATION CORPORATION, Defendant, for illness he has suffered and will continue to suffer due to tortuous acts directly caused by them as follows:

(a) in the amount of $32,849.00 for costs already incurred for treatment in three hospitals and one treatment center;

(b) in the amount of $2,000,000.00 to cover future anticipated treatment, monitoring and for present and anticipated suffering caused under the cause of action herein;

(c) Punitive damages in the amount of $1,000,000.00 by virtue of defendants' continued wanton and reckless conduct; and

(d) to compensate such others as may join this suit for illnesses, or maladies they may have suffered;

(e) Together with the costs and disbursements of this action; and proper; and

(g) Further demands trial by jury of all issues so triable as a right by jury.

DATED this 15,day of May , 2003, Millbrook, Town of Washington, County of Dutchess, State of New York.

Edward LeRoy Swindell
Edward LeRoy Swindell
Plaintiff, *PRO SE*

P.O. Box 36
Millbrook, NY 12545
Tel: 914-677-5991
Fax: 914-677-5397

STATE OF NEW YORK)
) ss.
COUNTY OF DUTCHESS)

On this 15th day of May, 2003, before me came

E. LeRoy Swindell,
to me known, and duly sworn did acknowledge that he executed the foregoing instrument.

JENNIFER ANN MILLER
NOTARY PUBLIC

My Commission expires: